SUPREME COURT OF THE UNITED STATES.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY C. SMITH.

ARGUMENT FOR THE DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The facts of this case are these: The plaintiff in error has for years voluntarily sold mileage tickets good for one thousand miles of travel, with the express provision that they should be used by one person only and should be valid for but one year. By Act No. 90, Public Acts of 1891, of the State of Michigan, all railroad companies in said state or carrying on bussiness partly within and partly without the state, are required to keep for sale at their principal ticket offices, thousand mile tickets to be issued in the name of the purchaser, his wife and children, and to be valid for two years at the rate of twenty dollars in the lower and twenty-five dollars in the upper peninsular.

The defendant in error tendered the plaintiff in error twenty dollars and demanded a thousand mile ticket to be issued in the name of himself and wife, and was refused, whereupon Mr. Smith filed a petition in the circuit court for the county of Lenawee praying for the writ of mandamus to compel the issuance of the ticket. The circuit judge granted an order that a ticket good upon the lines of the plaintiff in error in the state of Michigan be issued. Thereupon the plaintiff in error appealed to the supreme court of the state of Michigan, and after more than a year of deliberation, the said supreme court of Michigan affirmed the judgement of the circuit court for the county of Lenawee. And thereupon the said R. R. Company caused a writ of error to be issued out of this court, and now the case is here for its final decision.

ARGUMENT.

The single question of law presented in the case is this: The defendant in error having voluntarily sold milage tickets good for one thousand miles of travel for one person and for one year, can it be compelled by the state of Michigan to issue a precisely similar ticket good upon its lines in said state, not only for the purchaser, but his wife, and for two years instead of one?

It would seem that in this simple statement it would not be possible for such a great legal fight to be made as has been made in this case; but it is safe to say that but few cases that have come to this court from the state of Michigan have been more stubbornly contested and carefully considered than the one now under consideration.

In my opinion, no more important case was ever brought to this court than the present one, for the reason that this great constitutional question is now presented to this court for decision. Have the people of Michigan, through their representatives in the legislature, the constitutional power to control this plaintiff in error who received its life from their hands insofar as relates to the question of rates and tolls which it shall be permitted to exact from passengers over its lines in said state?

From the beginning we have contended that the legislature of Michigan possesses this power of control, and we have been sustained in our contention by the Circuit Judge who first decided the case and afterwards, by a majority of the Supreme Court of Michigan. On the other hand, the learned counsel who represent this corporation, have most vigorously denied that the legislature of Michigan possesses this power, and two members of the Supreme Court, in dissenting opinions, sustained their contention.

It therefore becomes necessary to argue this case at length and give it the careful consideration which its great importance to all the people of the United States demands. But before I enter upon the discussion, let me preface by saying that this act now denounced as unconstitutional, is a law of the State of Michigan, and therefore all of the presumptions of the law are in its favor.—It is presumed to be constitutional. The burden of the discussion therefore rests upon the plaintiff in error; for, in the language of Judge Cooley, "Where courts are called upon to pronounce upon the validity of an act of the legislature, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect and ponder upon it as long as deliberation and patient attention can throw any new light upon the sub-

ject, and *never declare a statute void* unless the nullity and invalidity of the act are placed in their judgments *beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action and the act sustained.*"

With all the presumptions of the law, then, in our favor and the burden of showing its unconstitutionality resting upon our opponents, I proceed to the consideration of the points which have been made by our opponents and the dissenting judges against the constitutionality of said act.

The learned counsel for the railroad company have presented many points; but the courts below, in deciding this case, have ignored most of them and have only thought a very few worthy of any consideration. In his long dissenting opinion, Mr. Justice Grant says:

"Several defences are interposed, but I deem it important to refer to but one, which I think is conclusive against the relator, viz.: Does the legislature possess the power under the constitution of this state to enact this provision requiring railroad companies to fix charges below the maximum rates, and compel them to enter into contracts for two years or for any number of years which the legislature may see fit to prescribe?"

In fact, the record of this case shows that the two great objections to the act challenged upon which counsel and dissenting judges rely, are these:

"*First.* That the legislature of Michigan does not possess the power under the constitution of the state to enact provisions requiring railroad companies to fix charges below the maximum rates, and compel them to enter into contracts for two years.

Second. That if it possessed the power generally, in this case it cannot be exercised, because the provisions of the charter of the Michigan Southern Railroad company, granted in 1846, in relation to rates and fares, are still in force and effect, and apply not only to the railroad formerly held and owned by that company, but to this plaintiff in error who, it is claimed, has acquired and succeeded to all the rights, privileges and franchises of that company under said charter, and therefore the act of 1891 does not apply to this plaintiff in error's road

These objections, and all others raised, were, in my opinion, answered by the opinions filed by the majority of the Supreme Court of Michigan, and to which I respectfully refer. But in answering these objections, I have additional points which I desire to argue at length. I claim,

First. The legislature of Michigan does possess the power to fix rates and tolls under all circumstances, and that it is immaterial whether a maximum rate has been named or not.

and that requiring the company to issue tickets for two years is clearly a matter of railroad regulation which the legislature possesses; and I claim further, that the legislature of 1846 had no power to contract with the Michigan Southern Railroad Company that it should have the right to fix its own rates and charges for transportation of persons and property, and thereby place it beyond the power of subsequent legislatures to change such rates.

Second. That if the legislature of that year did possess the power, it did not exercise it. In other words, the legislature did not make the contract which respondent claims it did make.

Third. Admitting for the sake of argument, that the respondent company had the power, and exercised it, then, I contend, that inasmuch as it appears of record that the Michigan Southern Railroad Company, after it received its special charter from the state by taking advantage of a statute of Michigan became consolidated with a corporation of the state of Indiana known as the "Northern Indiana Railroad Company," and thereby formed the Michigan Southern and Northern Indiana Railroad Company, and that afterwards, the said Michigan Southern and Northern Indiana Railroad Company, under due legislative authority in that behalf, entered into consolidation with certain other railroad companies organized under the laws of Indiana, Ohio, Pennsylvania and New York, respectively, and thereby formed the said respondent, the Lake Shore and Michigan Southern Railroad Company; that by reason of such consolidation, the special charter of 1846, granted to the Michigan Southern Railroad Company, was forfeited, and that no provision therein relative to rates and fares have any force or effect whatsoever, and have no application to the respondent in this case.

We will discuss these propositions in their order.

The great constitutional question which I now present to this court, and which I believe it has never decided, is of the greatest possible interest to every citizen of the United States, and is this.

Will this court sustain a charter which purports on its face to grant to a railroad company the right to fix the rate of fares and freight to be charged for the conveyance of persons and property on its railroad, free of all control by the state? In other words has one legislature the power to bind succeeding legislatures by a contract to that effect? This is the exact question raised by *Chief Justice Waite* in *Ruggles v. Illinois*, 108 U. S. 528, and the question was not decided because, on examination of the case the court found that no such grant was intended, and it has never been decided since.

and the question has never been presented to this court to my knowledge.

My position is, that the legislature of a state always has the power to fix said rates, and the extent of judicial interference is protection against *unreasonable* rates. *Chicago, etc., Railroad Company v. Wellman*, 143 U. S. 344; *Stone v. Farmers' Loan & Trust Company*, 116 U. S. 307; *Chicago, Milwaukee, etc. Railroad Company v. Minn.* 134 U. S. 418. That every succeeding legislature possesses the same jurisdiction and power with respect to this question of fixing rates as its predecessor; that the latter has the same power to repeal and modify which the former had to enact, neither more nor less; all occupying in this respect a footing of perfect equality. That this must be so in the nature of things; that it is vital to the public welfare that every legislature should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved, may require.

Newton v. Commissioners, 100, U. S. 559.

In other words, I claim the state cannot by contract, divest itself of the power of controlling and regulating rates and tolls to be exacted by railroad companies; that there is now and always has been a limitation upon the legislative power to make such a contract; that the regulation of railroad charges falls under the police power of the state—a power which originally belonged to the people, and was never surrendered by them, and that this police power of the state, essential to its safety, and the protection of all its people, cannot be contracted away; that in all cases arising under this power there can be no contract; no irrepealable law, because it is a *governmental* subject. They involve public interests, and legislative acts concerning them are necessarily public laws.

If this proposition be corret, than the whole claim of the respondent relative to its vested rights, which it secured under the old charter of 1846, which was granted by the State of Michigan to a short line exclusively within its own territory, falls to the ground.

And in support of this proposition, I say:

1. It is conceded that there exists these limitations upon this legislative power, in some cases: That the governmental power of self protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. These are the words of Mr. Chief Justice Fuller in delivering the opinion of the court in N. Y. & N. E.

Railroad Co. v. Bristol, 151 U. S. 567, and he cites, Beer Co. v. Massachusetts, 97 U. S. 25; Fertilizing Co. v. Hyde Park, 97 U. S. 659; Barbier v. Connolly, 113 U. S. 27; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650; Mugler v. Kansas, 123 U. S. 623; Budd v. New York, 143 U. S. 517.

2. It is likewise thoroughly established by the Supreme Court of the United States, that the inhibitions of the constitution of the United States upon the impairment of the obligation of contracts or the deprivation of property without due process, or of the equal protection of the laws of the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. See 151 U. S. 567. That wherever the preservation of the public safety, public health and public morals is concerned, an act of one legislature granting, in the most positive terms, franchises, rights and privileges, may be repealed by a subsequent legislature, and this notwithstanding the State may have entered into a most solemn contract and on the truth of which millions of dollars may have been invested.

Salus Populi Suprema lex.

It is further conceded that these words of the Chief Justice in the Bristol case, are true, viz.: "That though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression. [Citing] Nashville, etc., Railway v. Alabama, 128 U. S. 96; Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174; Minneapolis, etc., Railroad v. Beckwith, 129 U. S. 26; Dent v. West Virginia, 129 U. S. 114; Charlotte, Columbus, etc., Railroad v. Gibbes, 142 U. S. 386; Minneapolis & St. Louis Railway v. Emmons, 149 U. S. 364."

It is also conceded that it is the settled law of this country that notwithstanding the fact that a legislature may have granted to a railroad corporation the absolute power, in general terms, of fixing rates and tolls, this general grant of power is still nevertheless subject to, and controlled by the common law rule, that the rates and tolls so fixed, *shall be reasonable.*

As Mr. Justice Harlan, in announcing the judgment of the court in Smyth v. Ames, 169 U. S. 544, 545, says: "A railroad is a public highway, created for public purposes. It performs a function of the State. Its authority to exercise the right of eminent domain and to charge tolls was given

primarily for the benefit of the public. It cannot therefore be admitted that a railroad corporation maintaining a highway under the authority of the State, may fix its rates with a view solely to its own interest, and ignore the rights of the public. * * * A corporation maintaining a public highway, though it owns the property it employs for accomplishing public objects, must be held to have accepted its rights, privileges and franchises subject to the condition that the government creating it, or the goverment within whose limits it conducts its business, may, by legislation, protect the people against unreasonable charge for the services rendered by it. It cannot be assumed that any railroad corporation accepting franchises, rights and privileges at the hands of the public, ever supposed that it required, or that it was intended to grant to it, the power to construct and maintain a public highway simply for its benefit without regard to the rights of the public. The public cannot properly be subject to unreasonable rates in order simply that stockholders may earn dividends. The legislature has the authority in any case where its power has not been restricted by contract, to proceed upon the ground that the public may not be rightfully required to submit to unreasonable exactions for the use of a public highway established and maintained under legislative authority."

And Mr. Justice Bradley in Wabash etc. Ry. Co. vs. Illinois, 118 U. S., 586, used these words:

"The highways in a state are the highways of the state. Convenient ways and means of intercommunication are the first evidence of the civilization of a people. The highways of a country are not of private but of public institution and regulation. In modern times, it is true, governments are in the habit, in some countries, of letting out the construction of important highways requiring a large expenditure of capital, to agents, generally corporate bodies created for that purpose, and giving to them the right of taxing those who travel or transport goods thereon, as a means of obtaining compensation for their outlay. But a superintending power over the highways, and the charges imposed upon the public for their use, always remains in the government. This is not only its indefeasible right, but is necessary for the protection of the people against extortion and abuse. These positions we deem to be incontrovertible. Indeed, they are adjudged law in the decisions of this court. Railroads and railroad corporations are in this category." And in many other cases the strongest possible language is used, to show the absolute necessity for the legislature to retain this power of control, in order that the public may not be required to submit to unreasonable exactions.

I assert then, with absolute confidence, that the decisions of this Court sustain to the fullest extent, the proposition that the protection, the safety, the health, the morals, the good order, and the general wellfare of the people, are the chief end of government; that the police power is inherent in the states, reserved to them by the constitution, and necessary to their existence as organized governments; that the police power extends to the control and regulation of things, which, when used in a lawful and proper manner, are subjects of property and of commerce and yet may be used so as to be injurious or dangerous to the public safety, the public health or the public morals, and that it is the settled rule of law in this country, that in all cases involving the public health, the public morals and the public safety, a contract made by one legislature, granting in the strongest possible language, rights and privileges to a corporation, can, at any time thereafter, be changed by the act of a subsequent legislature, and that in all cases where the board of directors of a railroad company, under the charter given to them, have been empowered in general terms, to fix rates and tolls for the transportation of passengers, and the carrying of freight, a subsequent legislature can change these rates and tolls. In other words, can change the express words of the contract which granted the privilege, because this Court has adjudicated that this general grant of power was taken subject to a common-law rule, viz: that the rates so fixed must be reasonable.

But notwithstanding this court has so decided time and time again, it is seriously affirmed in this case that the police power, the aid of which I invoke, has no application to the case at bar, for the reason that a contract with a railroad company relative to the rates and tolls to be exacted from passengers, has nothing whatever to do with life, the public health, the public morals, or the public safety. Therefore, when such a contract, no matter how unfavorable it may be to the state, is once made, the obligations of said contract is forever protected from legislative impairment by the constitution of the United States.

And it is even claimed by one of the dissenting judges that no authorities can be cited which sustain so unlimited a power; that if it be sustained, these companies have no control over their affairs and business, except to carry on such contracts for common carriage as the legislature may see fit to prescribe; that certainly citizens who have invested their money in these corporations are entitled to some control over their business and affairs, and that it is difficult to understand what control is left to them if this law is sustained, and the question is asked, why should the legislature be

authorized to make contracts for the companies, and the judges of our courts determine their reasonableness, when such contracts have no reference to the comfort, safety, or welfare of society? The property of railroads is private property it is said. Neither the state nor the public has a penny invested in them. Private capitalists contributed every dollar to their construction and equipment, and their owners have built them for private profit, and not as public benefactors.

My answer to this proposition is found in the words of this court, over and over again repeated, that while railroad corporations are private corporations, as distinct from those created for municipal or governmental purposes; their uses are public; a railroad is a public highway, created for public purposes; it performs a function of the state, and that when capitalists put their money into the construction of a railroad, they know in advance that they are doing *pro tanto*, the work of the government, and they voluntarily submit themselves to the control of the government, relying upon the good sense and good judgment of the legislative department, and knowing that they can appeal to the courts when an act has been passed which deprives them of the use of their property. In other words, when they can establish the fact in the courts that the law is unreasonable, in this, that it deprives them of a reasonable return on their investments. To exact from a passenger more than a reasonable rate is *extortion*.

We claim that the state, has the right, and it is its duty to prevent extortion. It has been the custom from time immemorial for it to do so.

The state has no power nor moral right to authorize extortion and make this authority extend into the future, either for a number of years, or forever, and thus render future generations helpless to protect themselves against positive evil.

As already stated, common carriers have been subjected to regulation from the beginning. They have not only been compelled to enter into contracts, but some contracts forced by them upon their patrons have been held void as against public policy. At common law a carrier entrusted with goods or money could not agree with the owner that he should not be liable if the goods were stolen from him, for this might lead him to connive with thieves. The law was always used to compel him to receive property and to carry persons without discrimination. His charges have always been fixed by law. This rule was applied to stage coaches and hacks, and is still applied in every city that boasts of anything like civilization.

Is there anything about railrords that should exempt them from the same regulations that have always been applied to other common carriers?

It is claimed that when railroad companies are authorized by their charters to fix their rates of charges up to a certain limit, and they build their roads under these charters, good faith requires that no matter how extortionate the rate may become they should be protected from interference with it. They point to the enormous sum of money invested, and insist upon the sacredness of the original limit as a contract.

Considered from their side alone the argument is plausible. It is like the argument formerly used for the protection of property in slaves. The slaveholder was accustomed to say, "I bought this man and invested my money in him. It destroys my property to make him free."

There is another side to the argument. The man who is compelled to pay a railroad company an unjust and extortionate rate because his father paid that rate at a time when it was reasonable, is robbed, under the forms of law, of a certain amount of his property. The slave who is surrendered up as property is robbed of his liberty.

The principle is clear, although in some quarters its recognition has been imperfect. The right to regulate the business of railroads to some extent has always been conceded.

In the Chicago & Alton R. R. Co. vs. The People, 67 Ill., 11, it was held that the legislature had the power to prohibit unjust discriminations in railway freights.

In Commonwealth vs. Eastern R. R. Co., 103 Mass., 254, it was held that a statute requiring a railroad company to establish a station and build a station house at a certain point on its line, and stop at least two trains a day there, was valid.

In R. R. Co. vs. Fuller, 84 U. S. 710, it was held that a statute requiring railroad companies to fix their rates of compensation annually, and post up the same in their depot buildings, was a valid police regulation. It is common to regulate the speed of railroad trains, especially in cities. It is also common to compel them to fence their roads and to provide safeguards on their cars and at crossings. They have been compelled to use bells and signals to prevent accidents.

Many other police regulations might be cited which have never been questioned.

It is only when the state undertakes to regulate charges that the railroad companies claim a contract power to exact unjust rates, and in doing so, to confiscate the property of their patrons.

I claim that the safety of the state, and the right of all

the people to be protected from extortion, demands that this power of legislation be retained by the state, and that it should be held to be legally impossible to bargain this right of control away for all time, and that no state legislature can enter into a contract by which future generations, by reason of changed conditions, may be compelled to pay unreasonable rates for transportation over railroad lines.

I claim that the subject of rates and tolls being absolutely essential to the welfare of all the people, must always be within, and governed by, the police power of the state, and it can never under any circumstances be bargained away; that it is not the subject of contract to the extent that it can not be, at any time, changed or modified by a subsequent legislature, when it shall appear that the welfare of the people depend upon such a change being made.

It is true that there are a number of cases in this court, where the judges, in writing the opinion, use words which seem to admit that the subject of rates and tolls is open to contract, but I insist that as the exact question has never been decided, these expressions are not authoritative and decisive. And that the cases cited and to be cited hereafter support my position. Am I not sustained in my contention that the fixing of rates and tolls is not the subject of contract, to the extent that a subsequent legislature cannot interfere with it by the application of the rule of law to which I have previously referred, viz: That the rates and tolls fixed by a railroad corporation must always be subject to the common-law rule of reasonableness, though the power to fix said rates may be given in the most positive and unlimited terms in their charter? Does not this common-law rule of reasonablesness always carry with it an implified limitation upon legislative power? Certainly, if the board of directors of a railroad company, under this common-law rule, can be prevented from naming a rate too high when they have been given full power in their charter, by that same token, the law of reasonableless is the supreme law which each and every legislature must recognize. One legislature may grant a charter, and may name a rate which shall be binding upon the parties until the next session of the legislature, at which time, taking advantage of thls common-law rule of reasonableness, the charter can be amended by the second legislature on the ground, and for the reason that either the first legislature had been induced to fix a rate too high, or by reason of changed conditions, it is then too high.

The rule for which I contend is a recognition of the great principle that this power of legislation is a power of government, continuing in its nature, and the state always, within

its own jurisdiction has the power to limit the amount of charges to be exacted by railroad companies.

This principle of continuing governmental control was clearly recognized in the great case of Munn v. Illinois, 94 U. S. 113, decided at the October term of this court, in 1876. That was a case of such magnitude, that in closing the opinion, Chief Justice Waite used these words: "In passing upon this question, we have not been unmindful of the vast importance of the questions involved. This, and cases of a kindred character, were argued before us more than a year ago by most eminent counsel, and in a manner worthy of their well earned reputation. We have kept the cases long under advisement in order that their decision might be the result of our mature deliberations." In this case, the great principle enunciated is "that under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property. That in the exercise of these powers, it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, millers, wharfingers, inn-keepers, and in so doing, to fix the maximum of rates to be made for services rendered, accommodations furnished, and articles sold, and that this limitation by legislative enactment of the rates charged for services rendered in a public employment, or for the use of property in which the public has an interest, establishes no new principle of law, but only gives a new effect to an old one." While Munn v. Illinois has been the subject of comment and criticism, its authority as a precedent remains unshaken, and in Budd v. New York, 143 U. S. 517, the court says: "We must recognize the principle therein maintained as firmly established," and many of the decisions of the State courts of this country affirming and recognizing the principle in the Munn case, are cited.

The police power of the State can be bartered away because under the powers of government inherent in every sovereignty, the State has the power to regulate the conduct of its citizens one towards another, and the manner in which each shall use his own property when such regulation becomes necessary for the public good, and in cases in which property is charged with a "public interest" as in the case of a railroad company, it is within the power of the State to determine the rates and charges which shall be exacted of the public for the use of such property. As was said in the case of Munn v. Illinois, "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affects the community at large."

From the very nature of the property and business of railroad corporations, it follows that those corporations and their property are charged with a public interest, and that they are subject to control by the State. The power under which that control is exercised, is what is commonly known as the police power of the State. As has been seen, this power is inherent in every sovereignty, and cannot be bargained away.

The respondent claims the existence of a contract between itself and the State, by the terms of which, certain special and exclusive privileges are granted to the respondent, the very nature of which, would be to deprive subsequent legislatures of the right to exercise to its full extent, the police power of the State.

These special and exclusive privileges, if any such were intended to be granted to the respondent by the legislature giving to it its special charter, must give way to the police power of the State. That power is the supreme law, to which, when exercised, all contract rights are subservient.

The police power has been defined to be,

"The right of the State functionaries to prescribe regulations for the good order, peace, protection, comfort and convenience of the community which do not encroach upon the like power vested in congress by the constitution."

In the case of Mayor, etc., v. Milne, 11 Peters, 139, the police power is aptly described by Barber, Judge, in the following terms:

"We should say that every law came within this description which concerned the welfare of the whole people of a state, or any individual within it, whether it related to their rights or their duties; whether it respected them as men or as citizens of the State; whether in their public or private relations; whether it related to the rights of persons or of property, of the whole people of a state, or of any individual within it; and whose operation was within the territorial limits of the State, and upon the persons and things within this jurisdiction."

In the leading case of Munn v. Illinois, 94 U. S., 125, Mr. Chief Justice Waite, delivering the opinion of the court, in speaking of the police power, said:

"From this source come the police powers which, as was said by Mr. Chief Justice Taney in the Licence Cases, 5 How, 583, 'are nothing more or less than the powers of government inherent in every sovereignty * * * that is to say, * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property when such regulation becomes necessary for the public good. In their exercise it has

been customary in England from time immemoral, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, inn keepers, etc., and in so doing to fix a maximum charge to be made for services rendered, acommodations furnished, and articles sold. * * * This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be juris privati only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

Clearly, within these definitions and descriptions of the police power, falls the right of the State to regulate rates, tolls and charges to be taken and made by railroad companies, common carriers and other corporations, or persons engaged in a similar public service. The railroad companies were included within the description found in the case of Munn v. Illinois, is indicated by the language used in that case on page 130, as follows:

"Common carriers exercise a sort of public office, and have duties to perform in which the public is interested. New Jersey Nav. Co. v. Merchants' bank, 6 How. 382. Their business is, therefore, 'affected with a public interest' within the meaning of the doctrine which Lord Hale has so forcibly stated.

But we need not go further. Enough has already been said to show that, when private property is devoted to a public use, it is subject to public regulation"

The case of Chicago, Burlington & Quincy R. R. Co., v. Iowa, 94 U. S. 155, bears out the proposition that railroad companies, and regulations affecting them, come within the rule laid down in the case of Munn v. Illinois. In that case it was said:

"Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest, and, under the decision in Munn v. Illinois, 94 U. S. 113, subject to legislative control as to their rates of fare and freight, unless protected by their charters. * * * This company, in the transaction of its business, has the same rights, and is subject to the same control as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business."

The language above quoted from the Chicago, Burlington & Quincy Railroad Company, was quoted with approval in the case of Dow v. Beidelman, 125 U. S. 687, where the court, continuing (p. 687), said:

"The same rule was affirmed and acted on in several other cases decided at the same time, in the first of which the Chief Justice, in answering 'the claim that the courts must decide what is reasonable, and not the legislature,' said: 'Where property has been clothed with a public interest, the legislature may fix a limit to that which in law shall be reasonable for its use. This limits the courts, as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change."

In the case of Dow v. Beidelman, supra, the court, quoting with approval, from the case of Stone v. Farmers' Loan & Trust Company, 116 U. S. 307, said:

"It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce."

Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 215.

The doctrine of the above cases was affirmed in the case of Chicago, etc., Railroad Company v. Wellman, 143 U. S. 339, where it was said:

"If the contention be that the legislature has no power in the matter, and that an act fixing rates, however high they may be, is necessarily unconstitutional, it is enough to refer

to the long series of cases in this court in which the contrary has been decided. The legislature has power to fix rates, and the extent of judicial intereference is protection against unreasonable rates."

To the same effect is found the case of Georgia Banking Company v. Smith, 128 U. S. 174, where Mr. Justice Field, in delivering the opinion of the court, said:

It has been adjudged by this court in numerous instances that the legislature of a state has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters. * * * and the obligation, assumed by the acceptance of its charter, to transport all persons and merchandise, upon like conditions and upon reasonable rates, affect the property and employment with a public use; and where property is thus affected, the business in which it is used is subject to legislative control. So long as the use continues, the power of regulation remains, and the regulation may extend not merely to provisions for the security of passengers and freight against accidents, and for the convenience of the public, but also to prevent extortion by unreasonable charges and favorism by unjust discrimination. This is not a new doctrine but old doctrine, always asserted whenever property or business is, by reason of special privileges received from the government, the better to secure the purposes to which the property is dedicated or devoted, affected with a public use. There have been differences of opinion among the judges of this court in some cases as to the circumstances or conditions under which some kinds of property or business may be properly held to be thus affected, as in Munn v. Illinois, 94 U. S. 113, 126, 139, 146; but none as to the doctrine that when such use exists the business becomes subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression. In almost every case which has been before this court, where the power of the State to regulate the rates of charges of railroad companies for the transportation of persons and freight within its jurisdiction has been under consideration, the question discussed has not been the original power of the State over the subject, but whether that power had not been, by stipulations of the charter, or other legislation amounting to a contract, surrendered to the company, or been in some manner qualified. It is only upon the latter point that there have been differences of opinion.

For other cases to the effect that the legislature, in the exercise of its police power has the right to fix rates, see,

Ruggles v. Illinois, 108 U. S. 526, 534;

Wabash, etc., R. R. Co. v. Illinois, 118 U. S. 557;
Chicago, Milwaukee, etc., R. R. Co. v. Minn., 134 U. S. 418.
Budd v. N. Y., 143 U. S. 517, 547;
Wellman v. Railway Co., 83 Mich. 592;
Smith v. L. S. & M. S. R. R. Co., 72 N. W., 332.

By the cases cited it is established that one of the important features of the police power is the right of the state to fix the rates, tolls and charges to be taken or made by railroad corporations. The right to fix rates and charges being within the police power of the state, and that police power being absolutely inviolable, it follows that the right and power of the legislature to fix and regulate those rates, tolls and charges, cannot be bartered away. The same limitations surround and the same necessities demand the application of this portion of the police power as surround or demand the application of any other portion of it, and there is, and can be no reason why the right to fix rates, tolls and charges should constitute an exception to the principle that the police power of the state cannot be granted away. It is in the interest of the welfare, and the comfort, and the protection of the property of its citizens that a state is allowed and authorized to make proper police regulations, and it is likewise in the interest of the welfare and comfort and protection of the rights and property of its citizens, that a state is authorized and allowed to, and does fix the maximum of prices for the use by its citizens of property charged with a "public interest." The respondent is a corporation—a creature of the state, existing only by sufferance at the will of the state, which exclusively operates a franchise and property, and carries on a business affecting the State at large, and with which the citizens of the State at large, are obliged to come in contact. In other words, it operates a property which is charged with a "public interest." That being true, its property and rights remain subject to regulation by the State. It is absurd to say that the mere grant to the respondent, of the special privileges it claims, has curtailed or infringed upon the police power of the State. If it can be successfully contended that the State has granted to the respondent the right to fix its own rates and charges, and that a contract in relation to those matters now exists between the State and the respondent, which cannot be impaired by the State, the result is simply appalling. Applying the same principle, and carrying it but a little further; the granting of special charters and special privileges at each successive session of the legislature which would constitute contracts between the State and corporations, would result

in divesting the State of all of its sovereign powers rendering it a state in name only, powerless to attain the principal ends of its existence, viz.: those of securing and protecting the welfare, comfort, health and property of its citizens. It is indeed strange, if the State, to whom the people look for the protection of their private rights, the security of property, and freedom from imposition, is powerless as against this corporation, which owes its very being and existence to, and which has derived all of the rights and privileges which it enjoys and exercises, from its special charter granted by the State. From the very nature of the case it is impossible that the State has given up one of its principal powers of government. Even though language had been used by the State in the charter of the respondent which would create a contract between it and the respondent, still, as had been said, that contract must give way to the police power. The rule is, that all contracts, rights, privileges and property are held subject to that power, and notwithstanding the fact that a contract did exist, that respondent might charge a certain rate for carrying passengers, still, the legislature, in the proper exercise of its police power, could provide for a less rate, and such provision being made, would be the supreme law, to which the alleged contract between the State and the respondent must yield. This proposition is clearly borne out by the language used by Judge Cooley, in his work on Constitutional Limitations, (6 ed., 707), where, in speaking of the police power, he says:

"The occasions to consider this subject in its bearings upon the clause of the constitution of the United States which forbids the states passing any laws impairing the obligation of contracts have been frequent and varied; and it has been held without dissent that this clause does not so far remove from state control the rights and properties which depend for their existence or enforcement upon contracts, as to relieve them from the operation of such general regulations for the good government of the State and the protection of the rights of individuals as may be deemed important. All contracts and all rights, it is declared, are subject to this power; and not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity. Perhaps the most striking illustrations of the principle here stated will be found among the judicial decisions which have held, that the rights insured to private corporations by their charters and the manner of their exercise, are subject to such new regulations as from time to time may be made by the State,

with a view to the public protection, health and safety, and in order to guard properly the rights of other individuals and corporations. Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter-contract, removed from the sphere of State regulation."

To the same effect is the case of Beer Company v. Massachussetts, 97 U. S. 25, where (at page 33), the court said:

"Whatever differences of opinion may exist as to the extent and boundaries of the police power and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to provide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, salus populi suprema lex; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

Stone v. Mississippi, 101 U. S. 817;
New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 672;
Prentice on Police Powers, 281, 282.

In the case of Stone v. Mississippi, supra, it was said:

"All agree that the legislature cannot bargain away the police power of a state. 'Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the state; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police."

To the effect that the police power is paramount to contracts in charters, see cases cited in Rapalje & Mack's Digest of Railway Law, title "Charters," Section 25, as follows: Kansas Pac. R. Co. v. Mower, 16 Kan. 573, 9 Am. Ry. Rep. 400. Quoting Nelson v. Vermont & C. R. Co., 26 Vt. 717; Thorpe v. Rutland & B. R. Co., 27 Vt. 140; Lyman v. Boston & W. R. Corp., 4 Cush. (Mass.) 288; Pratt v. Atlantic & St. L. R. Co., 42 Me. 579; Norris v. Androscoggin R. Co., 39 Me. 273; Bulkley v. New York & N. H. R. Co., 27 Conn. 479.

The right and authority to regulate common carriers, and the charges to be made and tolls taken by them, has always been exercised by the several states to prevent excessive and

exorbitant charges and unjust discrimination by common carriers. These are matters in which the public is largely and vitally interested. A railroad is a quasi public corporation, and its charter is granted not merely for the purpose of placing the corporation in a position where it can make money, but the main design is for the public good, and to promote the general welfare of the community and all its rights of eminent domain and all its franchises as a corporation, are delegated and conferred upon it by the legislature as a trustee for that great purpose. Every corporation holds its franchise as every indvidual holds and owns his property, subject to the power of the legislature to make reasonable regulations as to the use of it. The power of the legislature to regulate the tolls of a railroad, is, after all, a part of the police power of the legislative department of the state government; and the test of that power is whatever is necessary to preserve and protect the rights of one citizen without invading the rights of another. Such power being vested in the legislature, being subject to its discretion, and being absolutely necessary for the protection of the people it cannot be parted with by implication merely, if at all.

In the case of Delaware R. R. Tax, 18 Wall. 225, speaking of grants and privileges, the Court said: "All public grants are strictly construed. Nothing can be taken against the State by presumption or inference. The established rule of construction in such cases is that rights, privileges, and immunities not expressly granted are reserved. There is no safety to the public interests in any other rule. And with special force does the principle, upon which the rule rests, apply when the right, privilege, or immunity claimed calls for any abridgment of the powers of the government, or any restraint upon their exercise. * * * The surrender when claimed must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the legislature, that doubt must be resolved in favor of the State."

In the case of Charles River Bridge Co., v. Warren Bridge, 11 Pet. 436, 548, the Court said: "The object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade; and are essential to the comfort, convenience and prosperity of the people. A state ought never be presumed

to surrender this power because, like the taxing power, the whole community have an interest in preserving it undiminished. * * * The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform transferred to the ends of privileged corporations."

In Stone v. Farmers' Loan and Trust Co., 116 U. S. 307, Mr. Chief Justice Waite uses these words: "It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce. This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt, it must be resolved in favor of the existence of the power. [Citing] Railroad Co., v. Maryland, 21 Wall. 456; Chicago, Burlington & Quincy Railroad Co., v. Iowa, 94 U. S. 155; Peik v. Chicago & Northwestern Railway Co., 94 U. S. 164; Winona & St. Peter Railroad Co., v. Blake, 94 U. S. 180, Ruggles v. Illinois, 108 U. S. 526, 531."

Munn v. Illinois, 94 U. S. 113.

And Mr. Justice Brown, in Louisville & Nashville Railroad Co. v. Kentucky, 161 U. S., at page 700, says, it is a general principle of law frequently declared, that where the police power is invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interest, it will be sustained, whenever it can be done without the impairment of vested rights, and the general rule holds good, that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and within legislative control, and in the exertion of such power the legislature is vested with a large discretion, which, if exercised bona fide for the protection of the public, is beyond the reach of judicial inquiry, and he quotes from the opinion of Mr. Justice Miller, in Butchers' Union Co. v. Crescent City Co., 111 U. S. 746, where, in delivering the opinion of the court, this great justice says: "While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of such power to the prejudice of the general welfare. These are the public health and public morals.

The preservation of these are so necessary to the best interest of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime."

That the police power of the State includes the regulation of highways and bridges within its boundaries has never been questioned. Railroads are public highways. That railroads, though constructed by private corporations and owned by them, are public highways has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had an existence. There are, no doubt, charter contracts and other legislative contracts, but what I maintain is that the legislature cannot confer upon a railroad an irrepealable and unchangable right to regulate its own charges.

As was said in East Hartford v. The Hartford Bridge Co., 10 Howard 511, 533-4, "The parties to this grant, did not by their charter stand in the attitude toward each other of making a contract by it, such as is contemplated in the constitution, and as could not be modified by subsequent legislation. * * * From the standing and relation of these parties, and from the subject-matter of their action, we think that the doings of the legislature as to this ferry must be considered rather as public laws than as contracts. They related to public interests. They changed as those interests demanded."

And in the case of Railroad Commissioners v. Portland and Oxford and Central Railroad Co., 63 Maine 269, the court said: "The public character of railroads further appears from the authority granted to them to exercise the right of eminent domain. No such right is ever granted to banking, manufacturing, or insurance corporations, or to academies, colleges, or hospitals established and conducted by private individuals or private corporations. It is solely because the use of railroads is public that this distinction is made."

And Mr. Justice Brewer, in his dissenting opinion in Budd v. New York, 143 U. S. 517, while criticising the doctrine established in Munn v. Illinois, and dissenting from it, recognizes the principal of governmental control, so far as we seek to apply it in this case. He says, "The vice of the doctrine in the Munn case, is, that it places the public interest in the use of the property upon the same basis as a public use of property. Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity, to-wit: the State, has a right to create and maintain, and therefore, one which all the public have a right to demand and share in. The use is public because the public may create it, and the individual creating it is doing thereby a pro tanto the work of the State. The creation of all high-

ways is a public duty. Railroads are highways. The State may build them. If an individual does that work, he is pro tanto doing the work of the State. He devotes his property to a public use. The State doing the work fixes the price for the use. It does not lose the right to fix the price because an individual voluntarily undertakes to do the work, but this public use is very different from a public interest in the use."

And then the learned justice proceeds to point out the distinction between a railroad, which is a highway and belongs to the public, whether built by the State or by a private individual representing the State, on the one hand, and the use of elevators and warehouses and other forms of private investments which may be used by the public.

The case which I have cited, and the reasonings of the court sustain, I submit to your honors, our contention, that the legislature of 1846 could not, by the charter given to the respondent, prevent a subsequent legislature from changing the rates and tolls therein named.

We submit, that the clause relative to rates and tolls in the charter of respondent, was not, in any sense, a contract within the meaning of the constitution of the United States, but is simply a license which the State, under its police power, and for the protection of the public, may, at any time change, and reduce the rates, so long as it does not undertake to place them below the standard of reasonableness. That no legislature can bargain away the public health or the public morals. That as the supervision of both these subjects of governmental powers, is continuing in its nature, they are to be dealt with as the special exigencies of the moment may require. That the State government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose, large legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. That the distinction is now thoroughly recognized between the contractual and governmental power of the State, to-wit: that the provisions of the federal constitution in reference to contracts, only inhibits the states from passing laws impairing the obligation of such contracts as relate to property rights, but not to subjects that are purely governmental.

We submit, that the regulation of rates and tolls is purely governmental in its nature, and therefore, cannot be bargained away.

We further submit, that all the reasons assigned by this Court in a number of decisions, as their justification for setting aside binding contracts contained in charters granted to railroad companies, by which, in the strongest, though in general language, the power was given to the directors to fix

rates and tolls apply with equal force to this case, because if you can change the rate of fares and tolls when once fixed by the board of directors, under a power given them in these words, "the directors are hereby authorized to fix such rates as they may deem to be reasonable," by the application of the common-law rule of reasonableness, you can invoke the same rule of law to change the rates at any time when they shall be deemed to be unreasonable, no matter what the words used in the charter by which the directors are given power to fix the rates.

SECOND PROPOSITION.

Assuming that the legislature of 1846 possessed the power to enter into a binding contract with respondent, by which it could have divested the State of all power over the subject of rates and tolls, and given this power absolutely to the respondent company, then I say that this power was not exercised, and I claim that there is not one word, or clause, or sentence in the entire act, which justifies the claim that is now made, and has been made for the last 50 years by representatives of the respondent corporation, that this power was given to them.

If I have not conclusively established the claim that this power can never be exercised, I certainly have demonstrated that, whenever it is claimed that the power has been exercised, it must be established by the clearest possible language, and if there is any doubt whatever, in regard to the matter, the doubt must be resolved in favor of the State, and against the corporation.

This is such an elementary rule of law that it seems entirely unnecessary to cite any decisions in support of it. However, I will quote a few.

In Ruggles v. Illinois, 108 U. S. 531, Chief Justice Waite used these words: "Grants of immunity from legitimate government control, are never to be presumed; on the contrary, the presumptions are all the other way, and unless an exemption is clearly established, the legislature is free to act on all subjects within its general jurisdiction as the public interests may seem to require. As was said by Chief Justice Taney, in speaking for the court, in Charles River Bridge v. Warren Bridge, 11 Pet. 420, 'it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created.' This is an elementary principle."

In Stone v. Farmers' Loan & Trust Co., 116 U. S. 307, it is decided that the right of a state to reasonably limit the amount

of charges by a railroad company for the transportation of passengers and property within its jurisdiction, cannot be granted away by its legislature, unless by words of positive grant or words equivalent in law, and that a statute which grants to a railroad company the right from time to time to fix, regulate and receive tolls and charges by them to be received for transportation, does not deprive the state of its power, within the limits of its general authority, as controlled by the constitution of the United States to act upon the reasonableness of the tolls and charges so fixed and regulated. That this power of regulation is a power of the government, continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant or something which is in law equivalent. If there is a reasonable doubt, it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall, in Providence Bank v. Billings, 4 Pet. 514, 561, "its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon t does not appear." This rule is elementary. And then the Chief Justice proceeds to point out special cases to illustrate the principle, as follows: "The incorporation of a bank without any special provision for taxation did not imply a contract on the part of the state not to tax at all," and quotes from the Delaware Railroad tax case, 18 Wall. 206, using these words: "The surrender of this power of the state, when claimed, must be shown by clear, unambiguous language which will admit of no reasonable construction consistent with the reservation of the power," and quoting from Bailey v. Maguire, 22 Wall. 215, "Silence on such a subject, that is to say, taxation for other purposes, cannot be construed as a waiver of the right of the state in this regard. There must be something said which is broad enough to show clearly that the legislature intended to relieve the corporation from a part of the burdens borne by other real and personal property." And in Fertilizing Company v. Hyde Park, 97 U. S. 659, where the company had been incorporated with authority to establish and maintain chemical works for fifty years, one of the reasons assigned by the court in deciding that it was not thereby prevented from causing the works to be abated in case they should become a public nuisance, was this: The absence from the charter of any express exemption of the company from the operation of the powers of the state applicable to its existing conditions for the time being.

And in Newton v. Commissioner, 100 U. S. 548, 562, where the seat of justice of a county had been fixed at Canfield, and the statute by which this was done provided that before the seat of justice shall be considered permanently established at Canfield, the citizens should donate a lot and make certain

provision for the erection of public buildings thereon. The citizens complied with all the requirements of the law and the seat of justice remained undisturbed at the place where it had been permanently established until 1874, when a law was passed for its removal to another town. The citizens of Canfield then caused a bill to be filed for an injunction restraining the county commissioners from effecting the removal, on the ground that the original act, and what was done under it, constituted an executed contract on the part of the State that the seat of justice should remain forever at Canfield, and the latter act impaired the obligation of that contract. The court held otherwise, saying, "If the legislature had intended to assume an obligation that it should be kept there in perpetuity, it is to be presumed it would have said so. We cannot, certainly not in this case, interpolate into the statute a thing so important which it does not contain." And the Chief Justice then proceeded to point out that the cases in which it had been held that a contract was entered into, are equally instructive. Thus in Gordon v. The Appeal Tax Court, 3 How. 133, the statute was that "upon any one of the banks of the State complying with the conditions of this act, the faith of the State is hereby pledged not to impose any future tax or burdens on the said banks during the continuance of their charter under this act." Home of the Friendless v. Rouse, 8 Wall. 430, the provision was that all property of said corporation shall be exempt from taxation, and that a certain existing statute to the effect that every acting corporation shall be subject to alteration and repeal, "shall not apply to this corporation." And on page 330, Chief Justice Waite says, "The right to fix reasonable charges has been granted, but the power to declare what shall be deemed reasonable has not been surrendered. If there had been an intention of surrendering this power, it would have been easy to say so. Not having said so, the conclusive presumption is there was no such intention." Quoting from the opinion of the Supreme Court of Mississippi, in Railroad Commissioner v. Yazoo & Mississippi Valley R. R. Co., 62 Miss. 607, these words are used: "A grant in general terms of authority to fix the rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation which shall be just and reasonable. It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation that the power of the legislature afterwards to interfere, can be denied."

These cases all establish what Chief Justice Waite states as an elementary rule of law, that the abandoment of power

of regulation by the government ought never to be presumed in any case in which the deliberate purpose of the statute to abandon it does not appear. Such being the rule, we need only to apply this rule to the special provisions of the charter under consideration to show that there is not one single word in this charter which justifies the claim that there has been an abandonment of this governmental power. On this point, I think Georgia Railroad & Banking Co. v. Smith, 128 U. S. 174 is decisive. It seems to me that this case is on all fours with the case at bar, and absolutely decides this case. The facts were that by an act of the legislature of Georgia passed in 1833, the Georgia Railroad Company was incorporated and empowered to construct a rail or turnpike road, etc. In the 12th section of its charter, among other things, are found these words: "The said Georgia Railroad Company shall at all times have the exclusive right of transportation or conveyance of persons, merchandise and produce over the railroad and railroads to be by them constructed while they see fit to exercise the exclusive right: Provided, That the charge of transportation or conveyance shall not exceed fifty cents per hundred pounds on heavy articles, and ten cents per cubic foot on articles of measurement, for every one hundred miles, and five cents per mile for every passenger." Forty-six years thereafter, the legislature of Georgia passed an act providing for the regulation of railroad, freight and passenger tariffs to prevent unjust discrimination and extortion in the rates charged for transportation of passengers and freights, and to prohibit railroad companies from charging other than just and reasonable rates. Thereupon the company filed its bill, in which it was contented, among other things, that the charter of the company was a contract between it and the State of Georgia, and that by it the company had the right to charge any rate for freight and passengers not exceeding those limited in the 12th section of its charter, and that the act was in conflict with the clause of the constitution of the United States which prohibits a State passing any act impairing the obligation of a contract.

Your honors will see that this case is a case precisely like the case at bar, involving the same legal principles, the provisions in the charter relative to charges are almost identically the same as ours, and no legal distinction, in my opinion, can be drawn between the two cases.

Mr. Justice Field, in announcing the judgment of the court, used these words on page 179: "It has been adjudged by this court in numerous instances that the legislature of a State has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the

company constituting a contract vesting in it authority over these matters, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation, and that what is done does not amount to a regulation of foreign or interstate commerce. So long as the use continues, the power of regulation remains, and the regulation may extend, not merely to provisions for the security of passengers and freight against accidents and for the convenience of the public, *but also to prevent extortion by unreasonable charges and favoritism by unjust discrimination.* This is not a new doctrine, but old doctrine always asserted whenever property or business is by reason of special privileges received from the government, the better to secure the purposes to which the property is dedicated or devoted, affected with a public use.

There have been differences of opinion among the judges of this court as to the circumstances or conditions under which some kinds of property or business may be properly held to be thus affected, but none as to the doctrine that when such use exists the business becomes subject to legislative control in all respects necessary to protect the public against danger, injustice or oppression. The question then arises whether there is in the 12th section of the charter of the plaintiff in error, a contract that it might make any charges within the limits there designated, and the language of Justice Field may be used as well in our case as in the case which he was deciding. The first clause of the 12th section would seem to have been framed upon the theory which obtained very generally at the date of the charter, that a railroad was subject, like an ordinary wagon road, to the use of all persons who were able to place the necessary conveyances upon it. It was then generally supposed that whilst the company constructing the road was the owner of the roadbed, any one could run cars upon it upon payment of the established tolls and following the regulations prescribed for the management of trains; and some charters granted at that period contained schedules of charges for such use. In considering the clause, and the words following the word "provided," he says: "The general purpose of a proviso as is well known is to exempt the clause covered by it from the general provisions of a statute or from some provisions of it, or to qualify the operation of the statute in some particular, but it is often used in other senses. But it does not matter in the present case whether the term be construed as imposing a condition on the preceding exclusive grant to the company of the privilege of transporting passengers and merchandise over its own roads, or be considered merely as a conjunction to an independent

paragraph declaring a limitation upon the charges which the company may make. If considered as a condition to the enjoyment of the exclusive right designated, then the section only provides that so long as the maximum of rates specified is not exceeded, the company or its lessee shall have the exclusive right to carry passengers and merchandise over its roads. It contains no stipulation, nor is any implied as to any future action of the legislature. If the exclusive right remains undisturbed, there can be no just ground of complaint that other limitations than those expressed are placed upon the charges authorized. It would require much clearer language than this to justify us in holding that notwithstanding any altered conditions of the country in the future, the legislature had, in 1833, contracted that the company might for all time charge rates for transporting passengers and property over its line up to the limits there designated. It is conceded that a railroad corporation is a private corporation, though its uses are public, and that a contract embodied in terms in its provisions or necessarily implied by them, is within the constitutional clause prohibiting legislation impairing the obligation of contracts. If the charter in this way provides that the charges which the company may make for its services in the transportation of persons and property shall be subject only to its own control and limit designated, exemption from legislative interference within that limit will be maintained. But to effect this result, the exemption must appear by such clear and unmistakable language that it cannot be reasonably construed consistently with the reservation of the power by the State. There is no such language in the present case. The contention of the plaintiff in error therefore fails."

Now, if your Honors please, I claim that this decision I have just given, decides this case; that the facts of the case are on all fours with this; that the language contained in the charter is precisely the same.

In the brief for respondent, reference is made to the fact that in the case of Georgia R. R. & Banking Co. v. Smith, the exclusive right granted was only for 30 years, and had expired at the time the proceedings in that case were instituted. It will be found from an examination of that case, that the exclusive right granted was the right to use its own road. At the time that exclusive right was incorporated into the charter, it was generally supposed that while the company constructing the road, was the owner of the road bed, anyone could run cars upon it, upon payment of established tolls, and following the regulations prescribed for the management of trains, but in the language of the Supreme Court in that case (page 180), "this notion has long since

been abandoned as impracticable." The question, therefore, of whether the exclusive right to use its own road had been granted, and whether or not that exclusive right had expired, was immaterial, as the road had the exclusive right without any grant to that effect, and after that grant had terminated.

This theory of the case is recognized in the case of Commonwealth v. Covington & Cin. Bridge Co., supra, 54 Am. & Eng. R. R. Cases, 461, 469, where it was said: "It is argued that in the case of Georgia R. R. & Banking Co. v. Smith the period for which the charter was to run had expired, and the court was discussing the power of the legislature to enact a law regulating the tolls after the expiration of the grant. Such could not have been the question involved; for if the grant had expired, no doubt could arise as to the power of the legislature over the question. It was a decision upon the one question, and that was: Did the terms of the grant to the Georgia Banking Company create a contract?"

Although difficult for the counsel for the respondent to make any concessions in this case *they must concede*, that it is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation, that the power of the legislature afterwards to interfere, can be denied.

It remains then, simply, for us to apply this rule to the language of this charter, to see if this unmistakable manifestation appears from the language used. Counsel for respondent claim that it does not appear because of the insertion of the maximum clause. Let us then consider this case on principle for a moment, without present reference to the binding authority of the case of Georgia Railroad and Banking Co. v. Smith, 128 U. S. 174, let us consider the question as to whether the insertion of a maximum clause in the contract, has any tendency to support the claim that this makes a contract by which the railroad company can fix rates and tolls free from legislative interference.

"That the several states have the right to fix, either directly through an act of the legislature or indirectly through a commission, reasonable maximum freight and passenger rates upon traffic wholly within their borders is settled. Chicago, Burlington & Quincy Railroad v. Iowa, 94 U. S. 155; Peik v. Chicago & Northwestern Railway, 94 U. S. 164; Chicago, Milwaukee & St. Paul Railroad v. Ackley, 94 U. S. 179; Winona & St. Peter Railroad v. Blake, 94 U. S. 180; Illinois Central Railroad v. Illinois, 108 U. S. 541; Railway Commission Cases, 116 U. S. 307; Wabash, St. Louis & Pacific Railway v. Illinois, 118 U. S. 557; Dow v. Beidelman, 125

U. S. 680; Covington etc. Turnpike Co. v. Sandford, 164 U. S. 578."

As I understand the position of counsel, they admit that a subsequent legislature would have power to lower the rates fixed in their charter, if the clause relative to three cents a mile had not been inserted. Of course, then, the single question is, for what purpose was this clause inserted in the contract? What was its object? The correct answer to this question is this. *The sole object of the insertion of the maximum rate in railroad charters, is to protect the state, and the people of the state from extortion.* A simple permission to railroad companies to charge an amount which the legislature fixed upon as a reasonable amount for the time being.

But counsel for the respondent say that because this clause was inserted in the contract as we have seen, for the protection of the state, they can use that clause for their interests and exact from each and every passenger a higher rate of fare than is reasonable, it being admitted that a two (2) cent rate is reasonable.

Let me ask each of the members of this Court, and let me ask the counsel who represents the respondent, which of two forms of contract they would regard as more favorable for their clients in a case like the following: There are a number of capitalists that contemplate the building of a railroad, and they are willing to invest their money in the enterprise, provided they can get a charter from the State which would be satisfactory to themselves. Let us suppose that one of the counsel for this railroad company is charged with the duty of getting as favorable a charter from the legislature as possible, and he afterwards calls a meeting of the capitalists in question, and submits this proposition to them. He says, "Gentlemen, I can announce to you that I can secure from the legislature of this State either one of the following contracts:

1st. The directors herein named are hereby authorized to fix such rates for the transportation of passengers, and to charge such tolls for freight as they see fit.

2d. The directors herein named are hereby authorized to fix such rates for the transportation of passengers, and to charge such tolls for freight as they see fit, provided that they shall not charge more than three cents a mile for passengers, and provided that they shall not charge more than a certain rate of tolls for freight."

Now, I ask the Court, I ask the counsel which of these two propositions, taking the words as they stand without present reference to the common law principle, they would regard as more favorable to the capitalists, and which he would advise them to adopt.

Can there be any question, if your honors please, but

what he would advise the acceptance of the first proposition? He certainly would, because it gives the directors full and complete power over the whole subject of rates and tolls, and to charge what they please.

But the second expressly limits this power, by the express declaration that under no circumstances during the existence of the charter can they charge more than three cents a mile. But, as we have seen, the courts, for the sake of saving the State from extortion invoked, in the first class of cases, the aid of a great common law rule, and they decided that when the power was given in broad and general terms in the charter, it is subject to the proviso, that the rates must be reasonable, because this corporation, although brought into existence by the investment of private means, receives its life from the State, and the work that it is engaged in is of a public character, because it is a great public highway for the use of the people, and the public are the first parties to be considered, and the interests of the people are paramount to the dividends of stock-holders, and therefore the Supreme Court of the United States declared, that (although it would seem from this language that there was an unmistakable intent on the part of the State to give to the gentlemen named as the incorporators of the road the power to fix the rates without any restraint whatever) the legislature did not have the power to do so, or rather, if the power to do so exists, at all, that the legislative intent is not established by the use of general terms.

Compelled then, by this ruling, to abandon the claim of power to fix rates from what would appear to any one, who can understand the English language, to be the more favorable of the two propositions, the learned counsel for the respondent now claim that when this broad sweeping delegation of power to the incorporators of the road is limited by the proviso that they shall not charge more than three cents a mile, that that makes a solemn contract by which they can, for all time, be permitted to charge three cents a mile, whereas, in my opinion, nothing can be more untrue, because the sole and only purpose for which that proviso was inserted into the contract was to protect the State and to limit the general grant of power which it was thought at the time would be given were the clause left out.

The insertion of the clause amounts simply to this: A legislative declaration that, as circumstances are now, we think if you charge up to the limit that we have made, that that would not be unreasonable; that that would not be unjust to the people of this State, and consequently we authorize you to charge up to the limit until such a time, as by reason of changed conditions, the charging of the maximum amount

named in the contract would be unreasonable by reason of the fact that you would then exact more from passengers than a just return upon your investments would warrant.

By reason of the changes brought about by new inventions, new discoveries and the application of electricity, that which would be reasonable as a maximum rate fifty years ago would be unreasonable now. The legislature, by this clause, reserves to itself the power of changing the maximum rate in order to conform to the changed conditions.

"TO DETERMINE RATES UPON THE BASIS OF REASONABLENESS."

And I repeat, that this element of reasonableness is so essential to the public welfare that it follows that the legislature cannot imperil it by entering into an absolute contract with railroads, authorizing them to charge a certain rate for toll for many years in the future, and thereby place it beyond the control of subsequent legislatures to save the people from extortion in case the rate fixed by the prior legislature was unreasonably high, it being essential to the public safety that the government should have absolute control over the entire subject of rates and tolls, and it is not in the power of the legislature under any circumstances by the use of any terms or phrases whatsoever, to enter into an absolute binding contract by which tolls of a certain amount may be exacted, free from all legislative interference.

To the same effect is the case of Peik v. Chicago, etc., R. R. Co., supra. In that case, the company was, by its charter authorized:

"To demand and receive such sum or sums of money for the transportation of persons and property, and for storage of property, as it shall deem reasonable."

The contention was made by the railroad company that this language constituted a contract between it and the State, giving to it (the railroad company) the exclusive right to fix its own rates and charges.

It was there held that that language did not constitute a contract between the State and the railroad company as was claimed for it.

In the case of State v. So. Pac. R. R. Co., cited supra, the language of the statute was that the railroad company:

"Shall have the power to collect and receive such tolls or freight for transportation of persons and property thereon as it may prescribe."

It was there held that this provision did not constitute a contract between the State and the railroad company, the obligation of which could not be impaired by subsequent legislation.

In the case of Commonwealth v. Covington & Cincinnati Bridge Co., supra, the language of the charter was:

"That the president and directors shall have the right to fix the rates of toll for passing over said bridge, and to collect the same from all and every person or persons passing thereon with their goods, carraiges, or amimals, of every description or kind. * * * And the said president and directors shall, from time to time, reduce the rates of toll, so that the net profits of said bridge shall not exceed 15 per cent per annum, after the proper deductions are made for repairs and charges of other descriptions."

An act was subsequently passed prescribing a lower rate of tolls to be charged and taken by the defendant company. The company refused to comply with the terms of the act, claiming that it was unconstitutional, and a violation of the contract contained in its charter. It was there held that the original charter provisions did not constitute a contract between the corporation and the state, the court saying (p. 465):

"We have found no decision of the Supreme Court since this question *as to the right of a state to surrender these governmental powers has been mooted*, where private property has been devoted to public use under legislative grants, in which that court has construed the grant as containing stipulations precluding the state from exercising any control over the rates or charges the citizen is required to pay for its use. * * * [469] The state does not bind itself by saying in express terms or by fair implication that no reduction of tolls shall be made to lessen this rate of interest or the net profits on the investment. There is no contract or agreement in this charter by which the state has agreed that this company shall forever impose such a burden on travel, if it sees proper, as will yield 15 per cent on the investment. The proviso is only a limitation on the rights and privileges previously granted, and to say that because a limit is designated it creates a contract is not sanctioned by reason of authority."

The facts presented in the last mentioned case were subsequently discussed and reviewed in the case of Covington & Cin. Bridge Co. v. Kentucky, 154 U. S. 204, and the subsequent act reducing the tolls and charges was held to be unconstitutional and void as an infringement upon the constitutional powers of congress to regulate commerce. The doctrine of the opinion in that case does not in any way detract from the force of the opinion of the state court upon the question material here, as the question of whether a contract had been created between the state and the defendant was not questioned or decided. The dissenting opinion concurred in by four of the judges, considered the question of a contract, not

between the corporation and the state, but as between the states of Ohio and Kentucky.

By force of decisions and principles everlastingly true, counsel for respondent are driven from their position, that the insertion of the maximum clause established the intent which they claim. Its sole object and purpose was just the contrary,—*To protect the State from extortion.*

Counsel for respondent in all of their researches have not been able to cite one single decision of this court, to either support the proposition that rates and tolls are the subject of contract, or that any language such as used in the charter under discussion, establishes the legislative intent to divest the State of the power of control, and they only cite one decision of the State courts, upon which they seem to rely. I refer to the case of Stone v. Yazoo & Mississippi Valley Railroad Co., 62 Miss., 607, and even in this one single, solitary case, which they have found in the judicial history of the United States to support their contention that rates and tolls is a subject of contract to such an extent that it cannot be changed by an act of a subsequent legislature, the court uses these words: "A grant in general terms of authority to fix rates is not a renunciation of the right of legislative control so as to secure reasonable rates. Such a grant evinces merely a purpose to confer power to exact compensation which shall be just and reasonable. It is only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation, that the power of the legislature afterwards to interfere can be denied. It is not to be presumed that the right of legislative control was intended to be renounced. Every presumption is against that. If the grant can be interpreted without ascribing to the legislature the intent to part with any power, it will be done. Only what is plainly parted with, is gone."

Now, if your honors please, assuming that this single decision is to be received as the law of the case, let us see just what the exact language of the charter in that case was, and we will find that it was entirely different from the language of the charter in the case at bar.

The power to fix rates and tolls is found in section 6 of the Mississippi charter, and reads as follows: "Be it further enacted, that said company shall have and possess the power of fixing from time to time by its board of directors, the rates at which it will do express and telegraph business, and shall transport other express companies, as may apply for transportation over its line, at a just and reasonable rate of compensation, and also the rates at which said company will transport persons and property over its railroad and branches.

Provided, said last mentioned rate shall not exceed four cents per mile for each passenger, nor exceed the following rates of freight. * * * But in no case shall the railroad company be limited to a less charge than twenty-five cents for the transportation of each passenger, parcel, package or article, however short the distance. The rates so established from time to time by the said board of directors for transporting persons or property as a railroad company not exceeding the maximum rates for railroad busines as above set out, MAY BE CHARGED AND COLLECTED BY SAID COMPANY."

Here, then if your honors please, are words not only showing the intention of the legislature to protect the State by the limitation that no fares shall be charged exceeding four cents per mile, but there is also the express legislative agreement that the maximum rate shall not be changed but that during the existence of the charter, four cents might be charged and collected. The clause contains both a limitation, and an affirmative grant of power.

EFFECT OF SECTION 37.

The decisions which I have now referred to establish the proposition that the language used in the respondent's charter does not constitute a contract between the respondent and the State. That no words contained in the act show an express legislative intent to put it beyond its power to regulate the rates and charges to be made by the Michigan Southern Railroad Company, reading the act without reference to section 37. But the respondent claims that the language of its charter does not come within the decisions referred to, because in section 37 of the charter these words are found:

"The State reserves the right at any time after 30 years from the passage of this act, by a vote of two-thirds of each branch of the legislature, to alter, amend, or repeal the same: Provided, That said company shall be compensated by the State for all damages sustained by reason of such alteration, amendment or repeal."

But the complete answer to that claim is this: There is nothing whatever in Section 37 which evidences the intent of the legislature to apply it to the provisions of the charter relating to the rates and charges of the railroad company; and unless it was clearly the intention of the legislature to thus apply the provisions of that section, it could not have such application. Without that section, the right of the State over the rates and charges of the Michigan Southern Railroad Company, under the decisions of the Supreme Court

of the United States are plenary; and the mere fact that the State has, in Section 37, in order to protect itself, reserved the right to amend, alter or repeal, thereby evidencing its intention to place a limitation upon, and not to extend the rights granted to, the respondent, should not be allowed to militate against the State: And such its operation will be, if the contention of the respondent is sustained.

Section 37 has no reference to the governmental question of rates and tolls, but to the rights, privileges and immunities which are secured to the railroad company in said charter by contract,—among them being the right to exist as a corporation to the exclusive use of its roadbed, the right to issue bonds, the right to acquire property by eminent domain, the right to establish its road, etc. As was said by Mr. Chief Justice Waite, in the case of Stone v. Mississippi, supra,—

"It is not the charter which is protected, but only the contract the charter may contain. If there is no contract, there is nothing in the grant on which the constitution can act. Consequently, the first inquiry in this class of cases always is, whether a contract has, in fact, been entered into, and if so, what its obligations are."

If the power to contract with reference to rates and tolls did not exist, or was not exercised, then, certainly Section 37 of the act does not refer to rates and tolls: And, as we are confident that the court will find the first, and certain, it will find the second to be true, I feel that I would be justified in paying no further attention to Section 37. But I again ask what was the object or purpose of inserting this paragraph in the act? The first words of the paragraph are a sufficient answer, viz.: The State reserves the right to repeal, alter or amend the charter, etc. The circumstances were most peculiar. This was not a case of giving a charter to build a road, but, in part, a contract to sell a road, already constructed,—built and owned by the State. Provision had already been made by which the State, after 21 years, might buy the road back on paying the amount stated in the contract; and then to provide for the safety of the State in case it was thought best not to buy back, Section 37 was inserted by which after 30 years the charter could be repealed, altered or amended. And as our half million dollars was the purchase price, and millions more would be expended in the course of 30 years, it was right that some provision should be made by which the stockholders should be awarded such damages as they could show had been sustained by taking from them those exclusive privileges which were the subject of contract. And here, again, in the determination of what was the subject of contract, we invoke the elementary rule,

that all doubts must be Resolved in favor of and not against the State.

Everything connected with and surrounding this charter points clearly, logically and forcibly to the fact that the legislature, in granting it, could not have intended to part with its complete and plenary power to regulate and alter the rates and charges to be charged and taken by the railroad company.

Stone v. Farmers' Loan & Trust Co., supra;
Ill. Cent. R. R. Co. v. Ill., 108 U. S. 541.

In construing this charter it becomes necessary to examine and consider the history of the respondent railroad company and its line of road, the circumstances and conditions surrounding it, and the relation of the State thereto, at the time that the charter was granted. Such examination and consideration leads to the conclusion that Section 39 of the charter was to have no application whatever to the provision that the company may regulate its own rates and charges within certain limits.

This section was the outcome of the particular circumstances surrounding the granting of the respondent's charter, and the reservation of the right to re-purchase, and was intended to be applied only to those rights, powers and privileges which were necessary to preserve and continue the existence of the respondent company as a corporation, which do not include rates, tolls and charges. Under it those rights, powers and duties are preserved from legislative interference except upon a compensation being rendered therefor. The right to repurchase was reserved to the State, and the method of arriving at the price to be paid by the State was set forth in the charter, and that price was made to depend particularly upon the market price of the stocks and bonds of the company.

Therefore, there being no provision in the charter of the Michigan Southern Railroad Company securing to it the right to fix and regulate the rates and charges it will make, independent of legislative interference or control, it follows that the legislature has the right to fix rates for that company, subject, however, to the limitation that those rates shall be reasonable: And it is not claimed that the rates fixed by the legislature in the act of 1891, are unreasonable.

THIRD PROPOSITION.

If the court should not agree with me upon either of the two propositions which I have argued at length, *I then insist that the judgment of the Supreme Court of Michigan should*

be affirmed because, by consolidation with several other companies, the old Michigan Southern Railroad Company voluntarily surrendered its charter of 1846. The Michigan Southern Railroad Company, when first constructed, was but a few miles in length, and wholly in the State of Michigan. It received its charter from the State of Michigan in 1846, which, among other things, granted to said road certain immunities, privileges and exemptions. It was for the directors and stockholders of this road to determine whether they would retain these immunities, privileges and exemptions and continue to run the little road in Michigan; and further, to determine whether the benefits which would result from consolidating with other roads would more than offset what they would lose in giving up said special immunities, privileges and exemptions. They determined that they would gain more by consolidation than they would lose.

I insist that from that moment, from the moment they took advantage of the Michigan law, namely, General Laws of Michigan for 1855, it must be held that the company elected to surrender its special privileges; for clearly, the company cannot claim all of the immunities, privileges and exemptions of a single Michigan road operating under a special charter, and at the same time all of the immunities, privileges and exemptions of the laws of the several States under which the great truuk system now running from Buffalo, N. Y., to Chicago, Ill., was created, and of which the portion in Michigan now forms a very small part.

The old Michigan Southern Railway Company, by entering into a new corporation, elected to become subject, not only to all the express terms and provisions of the law enabling it so to do, but also subject to the express provisions of the constitution of Michigan of 1850, which was in force at the time of such consolidation.

Section 50 of the act of 1855, under which the consolidation took place, contains this clause "and such new corporation shall possess all the powers, rights and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of their respective charters or laws of organization *not inconsistent with the provisions of this act.*"

Section 1 of Article XV of the state constitution reads as follows: "Corporations may be formed under general laws. All laws passed pursuant to this section may be amended, altered or repealed."

Section 33 of the laws of 1855 provides "The legislature may, when any railroad organized under this act is opened for use, from time to time alter or reduce the rates of toll, fare, freight, or other profits upon said road," and here the

words of Justice Field in Attorney General vs. Old Colony Railroad, 160 Mass., 95, may be adopted, simply substituting the words Michigan Southern Railroad Company in place of the words Old Colony Railway Company. With this change, it would read as follows: "Moreover, I am of opinion that the Michigah Southern Railroad Company, by accepting the benefit of legislation subject to the general laws which give the legislature the right to revise its fares, rates and charges, has lost its right, if it ever had it, to interpose the provisions of its original charter against the statute which assumes in a reasonable way to regulate or reduce its fares."

I repeat what I have said before in this argument, that there was nothing transferred by the act authorizing the consolidation, except the property of the company and the franchise and power and right to exist and do business as a corporation: that the legislature of 1846 had no power to bargain away the right of control over rates and fares; that if it did have a right it did not exercise it, and if it did have a right and had exercised it, then, they were extraordinary and special immunities and exemptions which pertained solely to the old Michigan Southern Railroad Company, and did not pass to the new road, because they were not specifically enumerated and mentioned in the statute so that the intent so to do would be established beyond any reasonable doubt.

St. Louis & San Francisco R. R. Co. v. Gill, 156 U. S. 649.

Shields v. Ohio, 26 O. St., 86; affirmed in 95 U. S., 319.

Railway Co. v. Commissioners, 112 U. S., 622.

R. R. Co. v. City of Grand Rapids, 102 Mich., 378.

Morgan v. Louisana, 93 U. S., 217.

Louisville & Nashville R. R. Co. v. Palmes, 109 U. S., 244.

Wilson v. Ganes, 103 U. S., 417.

Memphis & L. R. R. Co. v. Ry. Com'rs, 113 U. S., 609.

St. Louis & Iron Mt. Ry. Co. v. Ry. Com'rs, 113 U. S., 465.

Chespeake & O. Ry. Co. v. Miller, 114 U. S., 176.

As these cases are decisive of the point for which we are now contending, I will not further discuss the third proposition.

In the conclusion of this argument, I contend that there is no force whatever in the position taken by counsel and by the dissenting judges that the statute of Michigan is void because it seeks to compel this respondent to sell a mileage book good for two years. The propositions are elementary

that the legislature can compel any railroad company which received its life from their hands to accept and carry a passenger when he tenders the proper fare, for the reason that the legislature has created such companies for the very purpose of carrying such passenger; and by accepting its franchise from the State to carry on this public business, which the State itself might do, it agreed to be controlled by the State on all matters relative to the transportation of passengers, to enter into contracts which the legislature might determine were just, and to submit themselves to all reasonable conditions and terms pertaining to every material element of the contract for transportation. The only limitation in this power of legislative control, is this: that the conditions and regulations prescribed by the legislature shall be reasonable; and this principle applies as well to the length of time in which the owner of the ticket shall use it as to the price he pays for it.

As I regard these questions as settled by the decisions of this court, I shall not argue them further.

I respectfully ask that the judgment of the Supreme Court of Michigan in this case be affirmed.

FRED A. MAYNARD,
Attorney for Defendants in Error.

No. 227.
Brief of Smith for Appellee.

SUPREME COURT U. S.
FILED
MAR 6 1899
JAMES H. McKENNEY,
Clerk.

BRIEF OF APPELLEE.

Filed Mar. 6, 1899.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 227.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY,

vs.

HENRY C. SMITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF FOR APPELLEE, BY HENRY C. SMITH, IN PRO PER.

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Statement of Facts.

he Circuit Court for the County of Lenawee, Michigan, issued andamus, after a full hearing, requiring respondent to issue sell to relator a one-thousand-mile ticket for twenty dollars, n which he and his wife could ride. Such a ticket is proed for by Act 90 of the Public Acts of the State of Michigan 1891, which requires railway companies to sell one-thousande tickets to a man and his wife and the members of his ily, for twenty dollars in the Lower Peninsula and twenty- dollars in the Upper Peninsula. The Supreme Court of higan sustained the lower Court.

he present Constitution of the State of Michigan, adopted ratified in 1850, vests in the Legislature the power to regu- the charges of the railway companies for carrying pasgers.

he original charter of the Michigan Southern Railway Com-y, passed in 1846, permitted that company to charge a rate hree cents a mile for carrying passengers.

fter the adoption of the present Constitution, the Michigan thern Railway Company applied to the Legislature of the te of Michigan for authority to consolidate with a railroad

company of Indiana, which authority was given by the Michigan Legislature.

Respondent contends as follows:

(1) That this Statute under which relator was given such ticket is an attempt on the part of the Legislature to provide for the sale of mileage good outside of Michigan, which affects interstate commerce, and for this reason, that the law is unconstitutional.

(2) That by reason of its ancient charter, it has a right to charge three cents a mile, and that its charter is in force, and that as this charter was granted before the amendment to the Constitution, that this Statute in question impairs the obligation of their contract under their charter, and, therefore, is invalid.

(3) That the Act is unconstitutional for the reason that it is an attempt to compel railroad companies to enter into contracts to be performed in the future, and is an invasion of the right to the use of the property, and is in violation of the fourteenth amendment to the Constitution of the United States.

(4) That the amendment to the Constitution of the State of Michigan, Article 19 a, Section One, is a limitation upon the power of the Legislature to legislate as to rates, and limits the right to fixing maximum rates and not minimum rates.

The decision of the Michigan Supreme Court, 4th D. L. N., page 662, October 1st, 1897, states relator's position clearly and sustains his contention fully.

I will only discuss the propositions growing out of the consolidation of respondent, and will leave the others to be discussed by Attorney General Maynard.

After this case had been started by relator, and had been pending for some time, the Commissioner of Railroads and the Attorney General of the State of Michigan adopted the case on behalf of the State, and under the provisions of a concurrent resolution, passed in 1893, the State has carried on the litigation to test the charter of respondent, the question being of public importance.

ARGUMENT.

In the lower courts, counsel for respondent raised several technical preliminary questions. It was claimed that inasmuch as relator's petition did not expressly limit the ticket asked for to respondent's lines within the State of Michigan, that it must be understood that he demanded a ticket good over all of its lines, including those in other States, and that the order of the Court limiting the ticket to its lines within the State of Michigan, was without authority.

It was also claimed that relator only demanded a ticket upon the railroad *owned* by respondent, and that the order of the Court calling for a ticket upon the lines *operated* by

it within the State of Michigan, was too broad, for the reason that it operated a part of its line under a perpetual *lease*, and not as *owner*.

It was clearly understood and agreed by counsel for the parties at the hearing in the Circuit Court, that these preliminary questions, and the question of a demand by relator for a ticket, after the order to show cause was made, were waived. And the Honorable Circuit Judge so certifies. (Record, p. 15.)

Those questions were discussed in the Supreme Court, however, and I will argue them briefly.

As to the point that the order of the Court limited the ticket to the lines within the State of Michigan, being less relief than that petitioned for in the original application, we reply it is now the settled practice of this Court to grant a part of the relief prayed for even though the right to the whole is not established upon the hearing.

As this Court said in

Hosier *v.* Higgins, Township Board, 45 Mich., 342.

"There is no good reason for distinguishing in this regard between mandamus proceedings and other actions where a complete cause of action is made out less than the whole claim. We have discarded the old rule which seems to have prevailed under a different form of procedure, and which some of the earlier decisions of this Court adopted. We do not deem it applicable under the constitutional provision which has given this Court plenary jurisdiction in mandamus cases. Such remedies should be applied rationally."

The same rule was applied in

Bryant *v.* Moore, 50 Mich., 226.

Under the constitutional amendment of 1893, Act 12, p. 434, and the rule of this Court adopted in conformity to such amendment, the Circuit Courts of this State now have the same plenary power as formerly practiced by this Court in mandamus cases.

Before passing this point, we here suggest that if this Court in its final determination shall hold that the old

Michigan Southern charter is still in force, and entitles the respondent to charge three cents per mile over that old road, such charter certainly does not enable the other lines operated by respondent within this State to charge that amount.

Lake Shore Ry. Co. *v.* Grand Rapids, 102 Mich., 374.

If the Court shall find the only objection to granting this writ, to be the old Michigan Southern charter, then we insist that this Court will at least either modify, or direct the Court below to modify, its order by compelling the ticket to be issued over all the lines operated by respondent in Michigan other than the old Michigan Southern Railroad. And we so ask the Court, in case we are not entitled to the whole.

This question may be further considered under

THE INTERSTATE COMMERCE QUESTION.

Respondent contends that the 1891 statute "is a regulation of interstate commerce and is void."

We deny it.

The terms of the statute *limits the ticket to the State of Michigan.*

It fixes the price of the ticket, "*not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula.*"

It is common knowledge and of which the Court will take judicial notice, that respondent's lines in Michigan are all confined to the Lower Peninsula.

Under such a state of facts, and of the statute in question, it must be presumed that when relator demanded a one thousand mile ticket and tendered twenty dollars that he was only asking for such a ticket as the statute required, viz.: In the Lower Peninsula of Michigan.

Indeed his petition shows that his demand referred to the statute.

Certainly when the petition was filed referring to the statute, there could be no possible excuse for any pretended claim that a ticket good without the State was asked. But to obviate any possible misunderstanding, relator filed an express disclaimer (Record, p. 13), that he had asked or desired a ticket over any lines except those in the Lower Peninsula of Michigan.

We insist that there is not a decision of any Court that holds such a case to be a regulation of interstate commerce.

Even the case cited by the learned counsel, Mr. Pond, (Wabash Ry. *vs.* Illinois, 118, U. S., 557,) in his brief filed in the Michigan Supreme Court, expressly holds such a statute to be valid.

Attorney General *v.* Boston & Albany Ry., 160 Mass., p. 81,

is also directly in point.

IS THE ORDER TOO BROAD?

As to the objection raised by the learned counsel on page 33 of his brief, in Michigan Supreme Court, under point six, we call the Court's attention to the holding of this Court in the Wellman case, that Act 90, Sec. 9, of 1891, in question, does not apply to the owners of the roadbed, but it has reference to the company *operating* the railroad.

Quoting from the brief of the learned counsel Mr. Webber, on page 610, 83d Michigan:

"Every railroad in the State having now any considerable mileage is made by a union of companies—that is, different portions of the road were constructed under different and separate charters—but the *ownership of the passenger trains, and the practical ownership and control of the railroad*, is vested in the company which *operates* it; and this law under consideration * * * must have referred to the companies *operating the railroads*, and it cannot be held to apply separately to each particular company, whether general or special, by authority of which the road was originally constructed."

This Court adopted Mr. Webber's construction of the statute.

And as we have already said, when relator asked for a ticket as provided in this statute, he asked for such a ticket as the statute authorized, and on such of respondent's lines in Michigan as the statute referred to—which includes all the lines *operated* by respondent in Michigan.

As to the seventh point, found on page 35 of counsels brief, in the Michigan Supreme Court, that the Act is so indefinite as to be inoperative:

It seems to us that Railroad Companies, desirous or willing to comply with the statute, will find no difficulty in

interpreting it, and in issuing tickets in accordance with it. One thousand mile tickets, and the common terms upon which they have been issued are well understood, and there is no pretense that the ticket asked by relator shall vary from that in common use by the respondent, except as specifically mentioned in the statute.

And we submit that if any Railroad Company insists upon obstructing the statute, that the courts will have no difficulty in enforcing it by suitable process.

In this connection, the case of

Attorney General *v.* Old Colony Ry., 160 Mass., 62,

is instructive.

The statute under consideration in that case reads as follows:

"Sec. 1. Every railway corporation operating within this commonwealth shall provide and have on sale, for twenty dollars, mileage tickets, representing one thousand miles, which shall be accepted and received for fare and passage, etc."

The above quotation is the only description of the ticket given in the statute.

Paragraph 9, Section 9, of the law under consideration in our case reads:

" * * * * that one thousand mile tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State * * * at a price not exceeding twenty dollars in the Lower Peninsula and twenty-five dollars in the Upper Peninsula."

Then the statute further specifies certain things that the ticket shall contain.

It will be seen that the ticket provided for by this State is, if anything, more definite and specific than that provided in Massachusetts.

The Massachusetts case was discussed with great learning in the opinions filed, and resulted in a divided Court.

The Massachusetts act was held invalid for two reasons, and *two only*. Three of the five members held that the clause making the ticket good on every railroad within the commonwealth was invalid because it appropriated property to the public use without the owner's consent, and without legal provision for a reasonable compensation therefor.

2d. Because one railroad was permitted to fix the terms of the contract, which other roads were bound to accept.

The point contended for by three of the Justices was that the act compelled one railroad company to accept in

payment for transportation, the contract or promise of another railroad company, regardless of the question of the financial responsibility of such company.

The two dissenting Justices, in a very able opinion, insisted that the probability or possibility of pecuniary loss to one corporation in carrying passengers on the credit of another company, is infinitesimal, and that the objection was too theoretical and speculative to be considered as a violation of the constitution.

It is significent that none of the Justices deemed the question of the indefiniteness of the ticket mentioned, of any importance, and made no reference to that question.

We will have occasion to refer to this case again under each of the two main questions to be discussed hereafter.

ACT 123, LAWS OF 1891.

As to the fourth point made by counsel for respondent, argued on page 31 of his brief, in Michigan Supreme Court:

We submit that the criticisms of the learned counsel upon the act mentioned, No. 123, Laws of 1891, are not well taken.

It is possible the person who drafted the law may not have used as elegant rhetoric as the learned counsel of the Lake Shore & Michigan Southern Railway Company would have used; nevertheless, we submit that the meaning is very plain. The phrase, "may have been," criticised by him, is not open to the objection raised.

The meaning of that phrase plainly is: "may have had its being;" "may have had its existence;" "may have had its life;" "may have had its authority to act;" "by means of the consolidation."

Second. This act purports to amend an act entitled, "An act to revise the laws providing for the incorporation of railroad companies, and to regulate the running and management, and to fix the duties and liabilities of all railroads and other corporations owing and operating any railroad in this State."

So we say that the title to the act is fully as broad as that of the General Railway Law itself, and no broader.

Section 49, in terms, provides for bringing all railroads, and railroad companies operating railroads within this State, within the provisions of the general law to which this section is added.

Section 50 does not add anything to Section 49, except that it exempts certain railroads from certain provisions of Section 49, until a certain date fixed, hence it is not a

statute for "imposing a tax," or "revising a tax," in the sense used in the constitution. Nor is it open to the objection that it does not state the object to which the tax shall be applied.

Section 1 of Article 14 of the Constitution provides as to how all specific taxes shall be appropriated.

Wolcott *v.* People, 17 Mich., 63.
Westinghausen *v.* People, 44 Mich., 265.

So we say that Sections 49 and 50 do not refer to any *other law*, but only refer to certain sections of the same General Railroad Law, to specify the tax, viz.: a specific tax—all the sections of this General Law must be read together, including those added by the amendment.

The authorities cited by the learned counsel under this branch of his argument, (page 32 of his brief filed in Michigan Supreme Court,) as to when a former statute will be repealed by a subsequent statute, certainly can have no weight when applied to this case.

Section 51 of this act provides, "*that all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.*"

This language is certainly broad enough and sweeping enough to cover every former act of the Legislature, whether local or general, which is inconsistent, or in conflict with the General Railway Laws of this State.

If our contention, made further along in this brief, as to the result of the consolidation constituting the corporation known as the Lake Shore & Michigan Southern Railway Company, is found correct, then the necessity of this amendment Act 123 is not very apparent, except as it may bear upon the question of taxation.

The tax cases reported in 46th and 53d Michigan, and referred to by the learned counsel for respondent in brief in Michigan Supreme Court, seem to have induced the Legislature to declare, and give expression to its understanding and intention, that all railroad companies in this State, whether theretofore claiming to operate under special charters or otherwise, shall be taxed alike; and if the mode of taxation authorized under any of the old charters is inconsistent and in conflict with the mode prescribed by the General Railway Law, then such former provisions are repealed by this amendment, and such was the plain intention of the Legislature.

The law is pointed directly at the old special charters of every road claiming to be operating under them.

This intention is not only manifested by the general repealing Section No. 51, but in Section 49 the Legislature uses very specific language, viz.:

"And any *franchise, right, power, privilege, immunity or exemption,* claimed by any such railroad or railway company of a kind which would not belong to a company organized under the General Railroad Laws of the State as now existing or as hereafter amended, is hereby *annulled and abrogated;* and every such company shall be subject to all the restrictions and perform all the duties now imposed by the general laws or which may hereafter be imposed upon railroad companies."

If the title to the act which this amends, viz.: the General Railroad Law—is broad enough to include the matter of taxation of roads incorporated under it, as it manifestly is, then it is a startling proposition to say that an act amendatory of that law should or *could* embrace either in its title or the body of the amendments any subject foreign to the original act.

The provision of the charter requiring the State to pay all damages sustained by the Railroad Company, by reason of the repeal, is not a condition precedent to the repeal.

That proviso merely acknowledges such liability as may be established by proof after the repeal takes effect.

It must be presumed that the repealing act was passed with this contingent liability in view.

It is not an actual fixed liability which the Legislature was, at that time, called upon to provide means to meet, nor has it been, at any time since, called upon to appropriate or provide means to liquidate a liability that is only contingent or possible.

If the old Michigan Southern Railroad Company, and its charter, was in fact in existence, which we deny, at the time of the passage of Act 123, Laws of 1891, and any damage has followed by reason of the repeal of the act, it is for the Company to present its claim and have fixed whatever that liability may be, and then it will be the duty of the State to pay it.

And it must be presumed that the State will pay all its just obligations.

There can be no *presumption* that the Railroad Company has been damaged because it is required to operate its road under the general law of the State, rather than under a special charter. The fact that the general law of the State, as amended in 1891, Act 90, reduces the rate of fare from three cents per mile to two cents per mile, does not create

a presumption that such reduction damages the Company; that it either increases its expenses or diminishes its revenues.

And upon this question we cite

Wellman *v.* Railroad, 143 U. S., 339.

On page 343, the Court say: "Must it be declared as a matter of law that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business, and, therefore, the earnings?"

It must be borne in mind that the Legislature by the repeal has not deprived the respondent of the power to do business. On the contrary it substituted another franchise with many privileges and immunities not formerly held by the old Michigan Southern Company.

Indeed when the time comes to assess damages because of the repeal, if respondent shall ever ask damages, it will be seen that respondent has, in all probability, received and appropriated a *quid pro quo* for every immunity, privilege or exemption voluntarily released by it.

Under the circumstances and history of this repeal, and of the attitude assumed and insisted upon by the respondent ever since the amendment was passed, the respondent is in no position to complain because damages have not been paid or tendered.

Respondent has all this time refused to accept the situation, it refuses to admit or recognize the repeal, not because damages have not been tendered or paid. It refuses to present any claim. It repudiates the entire amendment because it claims the act is unconstitutional.

THE OLD MICHIGAN SOUTHERN CHARTER.

Before taking up the merits of this point it may not be amiss to reply to the suggestion of the learned counsel Mr. Pond, in his brief filed in the Michigan Supreme Court:

"That as late as 1883 the Legislature of the State assumed that the charter of the Michigan Southern Company was still operative, as in that year it passed an act amending Section 5 of said charter. (Sess. Laws 1883, p. 206.)"

We submit that this amendment cuts no figure in this discussion.

1st. It is apparent from the terms of the amendment

that its passage was desired and secured by the present respondent, the Lake Shore & Michigan Southern Railway, and for its exclusive benefit. It is, for that reason, fair to presume that it was dictated in the office of respondent's general counsel.

Now, if the passage of that amendment was sought for the purpose now suggested in this argument, viz.: *a recognition of the existence of the old charter*—it is quite safe to presume that no such purpose was disclosed to the members of the Legislature.

2d. In no event can it have any force as a declaration of legislative intent.

3d. Whatever effect it may have ever had, it certainly is no longer in force.

Act 123 of 1891 laws, clearly shows the understanding of the Legislature, and very clearly expresses its intention to settle any and all former disputes and contentions and misunderstandings as to all the old charters of every railroad in this State.

Such clearly expressed intention of the Legislature must be and is the end of the law, if it violates no principle of the State or Federal Constitution.

In his brief in Michigan Supreme Court, the learned counsel, Mr. Greene, also refers to this charter and relies upon its provisions and their transfer to the respondent as a defense, under two heads of his argument, viz.: his *Second Point* and *Fifth Point*.

The argument of the learned counsel under both of these heads is based upon the allegation in respondent's answer.

The paragraph of the answer relied upon is as follows:

Par. 5. "And the said Michigan Southern & Northern Indiana Railroad Company, afterwards, under due legislative authority in that behalf, entered into consolidation with certain other railroad companies organized under the laws of Illinois, Ohio, Pennsylvania and New York respectively, and *thereby formed the said respondent, the Lake Shore & Michigan Southern Railway Company;* and this respondent thereby acquired all the rights, franchises, powers and property of said Michigan Southern Railroad Company, and of the said Michigan Southern & Northern Indiana Railroad Company, and holds and is entitled to all the rights, franchises, powers and privileges granted in and by the charter aforesaid, and by the acts of the Legislature of said State, to said Michigan Southern Railway Company and the said Michigan Southern & Northern Indiana Railroad Company."

Par. 6. "That under and by virtue of the said charter of the said Michigan Southern Railroad Company, to all

the rights, franchises and powers of which, respondent has succeeded, the said Michigan Southern Railway Company had the power and authority to charge and did charge and fix the rate for the transportation of passengers over its railroad at *three cents per mile.*"

Counsel after referring to the answer then adds: "This allegation stands admitted upon the record in this case." (P. 25 of brief.)

On page 33 of brief in Michigan Supreme Court, under heading "Fifth Point," counsel again says:

"And as appears indisputably upon the record in this case, the respondent has acquired and succeeded to all the rights acquired or held by that Company under and by virtue of that charter."

The claim that these allegations of the answer stand admitted as allegations of fact and are therefore conclusive, is by no means true.

They are not allegations of fact, at all.

They are mere allegations of legal conclusions, of what the law is—of what the statute contains. They are allegations of matters which the Court will judicially know whether correct or incorrect.

If those allegations had been denied, an issue of fact would not have been raised for a preliminary determination by a jury.

It is a startling proposition that respondent in its answer showing cause, can conclude and settle a question of law, or statutory construction, by an allegation not denied—when all that is needed to disprove the allegation is reference to the statutes of our own State.

It will be seen that the answer alleges that this transfer was made "*under due legislative authority in that behalf,*" and of course refers to the General Railroad Laws of 1855.

Section 50 contains this clause:

"And such *new corporation* shall possess all the powers, rights and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of their respective charters, or laws of organization, *not inconsistent with the provisions of this act.*"

The italics are ours.

It is true that Section 52 of the same act again provides for transfer of the franchise, etc., from the *old corporations* to the *new corporations* and does not add the clause, "*not inconsistent with the provisions of this act,*" as does Section 50.

But it is nevertheless true that these two sections must be construed and read together—and that the limitation being in the statute clearly and specifically limits the transfer.

Because of the express limitation, and the *thereby* clearly expressed intention of the Legislature, as to how much and what portion of the old charter, franchise and privileges were transferred to the new consolidated corporation, the authorities cited by the learned counsel for respondent on pages 26, 27 and 44 and 45 of their brief in Michigan Supreme Court have no application.

The statute does not leave the question open for "presumption," but by its express terms excludes every immunity and exemption not consistent with the act under which the consolidation is made.

Section 33 of the Railway Laws of 1855 provides, "the Legislature may, when any railroad organized under this act is open for use, from time to time, alter or reduce the rates of toll, fare, freight or other profits upon said road. * *"

The old Michigan Southern Railway by entering into a *new corporation* consented to become subject not only to all the express terms and provisions of the law enabling it so to do, but also subject to the express provisions of the Constitution of Michigan of 1850, then in force.

Section 1, Art. 15, reads as follows:

"*Corporations may be formed under general laws.* * *

All laws passed pursuant to this section may be amended, altered or repealed."

It is plain that the respondent, the *Lake Shore & Michigan Southern Railway*, has no right to operate a foot of railroad or do an act within the State of Michigan except as it is so authorized by the General Railroad Law, which enabled the Michigan corporation to become part of it.

And it seems to us equally plain that so long as respondent assumes to act at all, and claims the right to operate railroad lines in Michigan, that it must submit itself to and obey all the provisions of that law.

To use the language of the learned counsel, Mr. Pond, in Michigan Supreme Court:

If the Michigan Southern Railway Company was "fool enough" to enter into a consolidation in face of the provisions and conditions incorporated in the law authorizing the consolidation, it "will of course be bound by the conditions." (Brief, p. 66.)

These conditions must continue to be binding so long as the Michigan Southern Railway consents to and continues to avail itself of the provisions of the consolidating law, which is the General Railroad Law

Nor is there anything inequitable or unjust in this proposition.

If the old Michigan Southern Railroad Company would insist upon retaining such immunities, privileges and exemptions as are inconsistent with the law under which respondent is now operating in the State of Michigan, it must withdraw from the consolidation, surrender the benefits and privileges that it obtained by the act of consolidation, and return to its old incorporation and its old charter, provided such corporation and charter are still in existence.

Whether it could do this without the consent of the other corporations that entered into the combination with it and formed the new corporation, is a matter of no consequence and has no bearing upon the case at bar.

If it should ever attempt to do so, however, it is not difficult to see that there would be many obstacles standing in its way.

Upon the point last discussed, we again call the Court's attention to the language of the Court in

Atty. Gen. *v.* Ry., 160 Mass., *supra.*

The Court says:

"In view of the many changes in the charters of nearly all the railroad corporations of the commonwealth since the year 1870, which have been *accepted* by the corporations, it may well raise a doubt whether these corporations have not *consented to be subject to* any laws which the Legislature under its general powers, may constitutionally enact concerning fares or tolls."

Opinion of Field, J., on p. 85.

Again on page 95:

"Moreover I am of the opinion that the Old Colony Railway Company, by accepting the benefit of legislation, subject to the general laws, which gives the Legislature the right to revise its fares, rates and charges, has lost its right, if it ever had it, to interpose the provisions of the original charters against the statute which assumes, in a reasonable way, to regulate or reduce its fares. * * * I am therefore of the opinion that the petitions should not be dismissed on the ground that the statute impairs the obligations of contracts securing to the defendant's immunity from reduction of fares."

Opinion of Justice Knowlton.

From the many decisions that directly and indirectly

bear upon the questions as to what franchises, privileges, immunities and exemptions pass from one corporation to another under the authority of legislative acts, it is apparent that two things must be constantly kept in view: First. The *intention of the Legislature*; and, Second. *The power of the Legislature* under the constitutional provisions in force at the time of the transfer.

It may be entirely apparent that the legislative act authorizing the transfer intended that the new corporation, organized for the purpose of receiving the property and franchise of the old, should have every franchise, right, privilege, immunity and exemption formerly held by either of the old companies, yet, if at that time, the constitutional restrictions prohibited the new corporation from holding the former franchises, immunities and exemptions, then the legislative intent would not prevail, it must yield to the constitutional prohibition.

So we insist that at the time of the organization of the Lake Shore & Michigan Southern Railroad Company, in 1869, and at the time of the passing of the law of 1855, authorizing the formation of such Company, the constitution provided,

"Corporations may be formed under the general laws. * * All laws passed pursuant to this section may be amended, altered or repealed." (Sec. 1. Art. 15.)

There is another principle of law well established which has an important bearing upon the question as to what was intended to be transferred to the consolidated company, under the terms of the general law of 1855.

We insist that there was nothing transferred by that act except the property of the company, and *the franchise and power and right to exist and do business as a corportion.*

That such special immunities and exemptions as remained and were held by the old Michigan Southern Company, and not common to other railway companies, would not have been tranferred even though the law authorizing the transfer did not expressly limit it to such franchise and privileges as were "not inconsistent with the provisions" of the 1855 law.

It is our contention that the immunities and exemptions *from reduction of fare and taxation*, were extraordinary and special immunities and exemptions, which pertained, solely, to the old Michigan Southern Railway Company, and that in order to tranfer such immunities and exemp-

tions they must be *specifically enumerated* and mentioned in the statute.

Upon this question we call the Court's attention to

Railway Co. *v.* City of Grand Rapids, 102 Mich., 378.
Morgan *v.* Louisiana, 93 U. S., 217.
Wilson *v.* Ganes, 103 U. S., 417.
Louisville & Nashville Ry. Co. *v.* Palmes, 109 U. S., 244.
Memphis & Little Rock Ry. Co. *v.* Ry. Commissioners, 113 U. S., 609.
St. Louis & Iron Mountain Ry. Co. *v.* Ry. Commissioners, 113 U. S., 465.
Chesapeak & Ohio Ry. Co. *v.* Miller, 114 U. S., 176.

As was well said by Justice Mathew, concurred in by the entire bench, in

Railway Company *v.* Commissioners, 112 U. S., 622.

"It is immaterial that the form of the transaction is that of a sale, mortgage, or other transfer *inter partes* of the franchise to be a corporation.

The real transaction in all such cases of transfer, sale or conveyance, as was said by the Supreme Court of Ohio, in the case of State *v.* Sherman, 22 Ohio State, 411–428, in legal effect is nothing more or less and nothing other, than a surrender or abandonment of the old charter by the corporators and grant *de nova* of a similar charter to the so-called transferees or purchasers.

To look upon it in any other light and to regard the transaction as a literal transfer or sale of the charter, is to be deceived, we think, by a mere figure or form of speech. *The vital part of the transaction, and that without which it would be a nullity, is the law under which the transfer is made.* The statute authorizing the transfer and declaring its effect, is the grant of a new charter couched in a few words, and to take effect upon condition of the surrender or abandonment of the old charter, and the deed of transfer is to be regarded as mere evidence of the surrender or abandonment."

The cases above cited were questions where special exemption from taxation was claimed.

The same principle was held and applied to a case where a special immunity from the reduction of the *rate of fare* was insisted upon, in the following case:

St. L. & San Francisco Ry. Co. *v.* Gill, 156 U. S., 649.

This was a case where certain railways in Arkansas were consolidated with another railroad company incorporated

under the laws of Missouri, in which the opinion was rendered by Justice Shiras and concurred in by the other Justices.

The Court say, at the bottom of page 656:

"It has been frequently decided by this Court that a special statutory exemption or privilege, such as *immunity from taxation or a right to fix and determine rates of fare,* does not accompany the property in its transfer to the purchaser in the absence of express directions to that effect in the statute."

Citing the above authorities.

The Court again say:

"As is said in the Supreme Court of Arkansas in the present case, (54 Arkansas, 101,) the corporation owning the several parts of road to which it is charged that the act operates unjustly, was dissolved years before it was passed. As to these it could not operate unjustly and in their behalf no cause of complaint can exist."

This authority effectually disposes of the contention of the learned counsel for respondent, that the old corporations do not and can not be said to be dissolved and a new corporation formed by a consolidation of different railroads incorporated under the laws of two or more States.

The case of

Shields *v.* Ohio, 26 Ohio State, 86,

and the same case reviewed by the United States Supreme Court, reported in 95 U. S., 319, is in full harmony with the case last above referred to.

This was a case involving the right of the present respondent, the Lake Shore & Michigan Southern Railway Company, to charge a higher rate than that fixed by the general statute of Ohio.

The effect of the consolidation of the several corporations into the Lake Shore & Michigan Southern Railway, this respondent, was fully discussed.

The Constitution of Ohio, at the time of the consolidation in 1869, contained a provision very similar to Section 1, Art. 15, of our own constitution, adoped in 1850.

Art. 13, Sec. 2, of the Ohio Constitution, provides:

"Corporations may be formed under general laws, but such general laws may from time to time be altered or repealed."

Art 15, of the Michigan Constitution, as it was and remained from 1850 to 1862, reads:

"Corporations may be formed under general laws, but shall not be created by special act except for municipal

purposes. All laws passed pursuant to this section may be altered, amended or repealed."

"The statute of Ohio passed in 1856 authorizes railroad companies of Ohio to consolidate with such companies *of other States.* The 3d section declares that such companies respectively shall be deemed and taken to *be one corporation possessing within the State all the rights, privileges, and franchises,* and subject to all the restrictions, liabilities and duties of said corporation of this State so consolidated. It was provided that the old stock should be extinguished, that a board of directors of the consolidated company should be elected, and that new stock should be created and issued to the parties entitled to it, those refusing to receive it were to be paid the highest market price for their old stock. The 7th section exacts that suits may be brought and maintained against such *new corporation* in the courts of the State in the same manner as against other railroad companies of this State."

Opinion of Sup. Court, 95 U. S., 321-322.

Sections 50, 51 and 52 of the General Railroad Law of Michigan passed in 1855, and still in force in 1869, and which permitted the new company to be organized so far as the lines in Michigan were required or desired, is almost identical with the statute of Ohio of 1856, referred to in the opinion above quoted; there is in fact no difference in the two acts so far as the question at issue is concerned. The States of New York, Pennsylvania and Indiana also passed similar laws.

Now it must be conceded that the Michigan law authorizing or permitting, call it what you will, this new "*corporation,*" the respondent, at least had an equal voice with Ohio in authorizing or permitting the new "corporation" and no more.

The same language in the Ohio Constitution and the General Railroad Law, also found in the Michigan Constitution and General Law, must have the same construction in Michigan as in Ohio. The U. S. Supreme Court having affirmed the Ohio construction.

The Ohio Supreme Court say, referring to this respondent, the L. S. & M. S. Ry.:

"The consolidation took place in 1869 and was effected in all respects pursuant of the act of April 10, 1856, (4 Curwen, 2791; S. & C., 372); and the claim is *that consolidation under that act is to be regarded in law as a surrender or relinquishment of the several individual charters of a company so united, and the acceptance of a charter de novo from the State.* If such be the law, it cannot well be denied that the consolidated company organized, as it was, after the taking

effect of the present constitution, is bound by and subject to all its provisions. Is such the legal effect of the consolidation? Are the old companies dissolved, and their charters extinguished and is the consolidated company a new corporation, receiving all its rights and powers directly from the Legislature?

In the light of the decision by this Court, in the case of the State of Ohio *v.* Sherman *et al.*, (22 Ohio St., 411), we do not see how an affirmative answer to these questions can be avoided. In the case referred to, the Court held, substantially, that a tranfer of all its franchises by a corporation, in pursuance of an act of the Legislature authorizing the same, is in legal effect a grant by the Legislature of similar franchises to the transferee, and constitutes them a new corporation. In that case, it was held, however, that the grant so made did not have the effect to constitute the tranferees a legal corporation, for the reason that their organization was not authorized, or was not effected in a way which made them individually liable as stockholders in the new corporation. No such defect or impediment exists in the present case; and, surely, if a statute of the kind in question in the case referred to, is to be regarded as a statute creating a new corporation, *much more is the statute in question here, the act of 1856, under which the Lake Shore and Michigan Southern Railway Company was organized to be so regarded.* This statute plainly contemplates and expressly provides for the formation of a "new corporation." The old stock is to be surrendered or extinguished; a new amount of capital stock is to be agreed upon and distributed to parties who voluntarily take the same; and a certificate is to be filed with the Secretary of State, which, it is declared, "shall be evidence of the existence of such corporation."

Section 3 of the act declares that the companies thus uniting, "*shall be taken and deemed to be one corporation.*" Section 5 provides for the election of a board of directors of the new corporation, which it denominates "a corporation created by" the consolidation, "and by the provisions of" that act, and vests in "such new corporation" all and singular "the rights, privileges and franchises" of the "*former*" corporation. Nothing could be much plainer, it seems to us, than that a consolidated company, organized under such a statute is a corporation "formed under a general law," within the meaning of Article 13 Sec. 2 of the present constitution, and as such, liable to all the limitations and restrictions therein, equally as corporations organized under the general corporation laws of the State, enacted under the present constitution. The fact that it

is formed out of old defunct corporations does not make it any the less a corporation created by the Legislature. It is not the material out of which it is formed, but the plastic hand which formed it, that we are to look to for its character and status under the constitution.

But it is argued that the consolidated company has the right to fix any rates of fare or passage which it deems proper over the old line of the Junction Railroad, because the original company had that right, and because all its franchises and rights have been transferred to the consolidated company. That argument would have been good before the passage of the act of 1873, or some other act limiting or modifying that right. This right to take unlimited rates of fare, or to take special rates of fare, is no more exempt from legislative control and alteration than it would have been had the company been formed under any other general law enacted since the adoption of the present constitution. All the rights and franchises of a company—this right to make and take rates of fare among the rest—were derived to the company under and by virtue of the act of 1856, and they are all alike subject irrespective of the rights of the old companies, to the legislative power *of alteration, amendment and repeal.*"

Shields *v.* State, *supra.*, pp. 91-3.

See also:

Compton *v.* Railway Company, 45 Ohio St., 592.
Lee *v.* Sturges, etc., 46 Ohio St., 167-169.
Ashley *v.* Ryan, 49 Ohio St., 527-529.

The Shields case is commented upon and approved in these cases.

It is now insisted by counsel that the Court had reference to a consolidation of two Ohio corporations. If the Court will examine the case carefully he will readily see that counsel are mistaken, *entirely mistaken.* There can not be any doubt about what corporation was referred to. The Court named *the Lake Shore & Michigan Southern Railway,* and every line, word and utterance of the Court above quoted had reference to that corporation and *none other.*

And a careful reading of this same case reviewed and affirmed by the U. S. Supreme Court, 95 U. S., 319, shows beyond question that the U. S. Court held the same views as to the result of the consolidation constituting the Lake Shore & Michigan Southern Railway. And distinctly held, that so far as to the line in Ohio and all the line within

the State the right of the Legislature to change and reduce the rate of fare is fixed by the statute of 1856, (4 Curwin, 2791, S. & C., 327,) and by the Company in Ohio accepting its provisions and consolidating with the other companies *outside of the State.*

It also holds that the subsequent act of 1873 reducing the rate applied to this Company as to its line in Ohio.

So here, we insist, that in Michigan, the "new corporation," The Lake Shore & Michigan Southern Railway Company, took all the rights, privileges and favors transferred to it at the time of the consolidation, and accepted them, as to the line in Michigan, *subject to future legislation in this State.*

That Act 202 of the laws of 1889 changed the rate of fare, and the old right to charge three cents per mile was changed.

That the same section re-enacted in 1891 is now the law of this State, and applies to all the lines in this State "*operated*" by respondent.

The United States Supreme Court say in the case of

Shields *v.* Ohio, *supra*, p. 324.

"It is urged that the franchise here in question was property held by a *vested* right, and that its sanctity, as such, could not be invaded. The answer is *consensus facit jus.* It was according to the agreement of the parties. The Company took the franchise subject expressly to the power of alteration or repeal by the General Assembly. There is therefore no ground for just complaint against the State."

It is insisted by the learned counsel, Mr. Pond, in his brief in Michigan Supreme Court that the old Michigan Southern & Northern Indiana Railroad Company was not a *new corporation;* and he also insists that the respondent, the Lake Shore & Michigan Southern Railroad Company, is not a *new corporation.*

He says on page 68 of printed brief:

"Now it is too clear for argument that the Legislature, by the passage of the act of 1855, authorizing the consolidation of the Michigan Southern Company with the Northern Indiana Company, did not intend that by acting under it the said Michigan Southern Company should surrender its charter. It could not have so intended; because the result would have been the creation of a corporation by a special act, which was forbidden by the constitution."

The special act referred to was approved February 13, 1855. The general law for the incorporation of railroad companies was approved February 12, 1855.

The things necessary to be done in order to effect a new corporation of the consolidated companies, are practically the same in the special act that they are under the general law.

What the purpose or necessity of this special act was, it is difficult to understand, because the general law fully authorized the Michigan Southern and Northern Indiana Railway Company to consolidate, and do just what they afterwards did. The fact that such a corporation is forbidden by the constitution to be created by a special act, cuts no figure.

It is entirely plain that the Legislature intended to create or authorize the creation of "*a new corporation.*"

It provides, Section 1, that said union shall "become *one corporation.*"

Section 3 provides "the said *corporation*, so to be organized by virtue of this act. * * "

Section 5 provides "the said *new corporation, so to be formed by such consolidation.* * * "

And in every place where the new body is mentioned or referred to in the act itself, it is called a "new corporation."

As to whether, during the life of this "new corporation," it actually operated by virtue of the special act or the general act which was passed at the same time, we do not know, as the general act fully authorized said corporation to act as it did act, and to unite as it did unite, and even if the special act was unconstitutional, the general act would save the "new corporation" from falling.

Mr. Pond further claims, on pages 68 and 69 of printed brief, that under the general law of 1855, the section authorizing the transfer of the rights and privileges, etc., of the Michigan Southern & Northern Indiana Railroad Company, included the right to continue to charge three cents per mile by the Lake Shore & Michigan Southern Railroad Company.

He says:

"Now, it is entirely clear that the right of the Michigan Southern Company to charge for the transportation of passengers not to exceed three cents per mile, was a *right* or *franchise* within the meaning of this provision."

If the learned counsel had carefully examined the opinion in St. L. & San Francisco Ry. Co. *v.* Gill, *supra.*, where this very question was directly passed upon, he would have seen that his contention is not the law.

As we have already said, that case expressly holds that

such immunities as taxation and the *right to determine and fix rates of fare*, are not included in the common terms "franchise, rights, etc.," unless specifically mentioned.

The case just cited, and also the case of Attorney General *v.* Boston & Albany Ry. Co., *supra.*, as well as the Shields case, all hold that the new entity, formed as respondent was formed, of corporations of different States, does constitute a new corporation.

On page 82 of the Massachusetts case, Justice Fields says:

"The Old Colony Railway Company *is a corporation* in this commonwealth and in the State of Rhode Island, *formed by the union* of various railroad companies chartered by this commonwealth or by the State of Rhode Island."

The petition in this case alleges:

Par. 1. "That the Lake Shore & Mich. Southern Railroad Company is and was on, to-wit: the 19th day of April, last, and for a long time prior thereto, had been a private corporation organized and doing business under the laws of the State of Michigan, partly in this State and partly in the States of New York, Ohio, Indiana and Illinois, and as such, operated a railroad in said States except in the Upper Peninsula of the State of Michigan, for the transportation and carriage of persons and freight."

Paragraph 1 of the answer, page 9 of Record, alleges:

"That this respondent, the Lake Shore & Michigan Southern Railway Company, *is a railroad corporation*, owning and operating a railroad between Chicago, in the State of Illinois, and Buffalo, in the State of New York, which passes through and into the States of Illinois, Indiana, Ohio, Pennsylvania and New York. * * * * *."

If the learned counsel, Mr. Pond, had read the answer filed in this case before preparing his brief, he must certainly have forgotten that it was admitted in the answer that the respondent "is a corporation."

We have not overlooked the two tax cases in this State, reported in 46 Mich., 224, and 53 Mich., 79, and we think we fully appreciate the force and weight of the language of Mr. Justice Cooley, quoted by counsel on page 47, printed brief, filed in the Michigan Supreme Court.

It must be conceded, however, that this language of the learned Justice was a mere *dictum*, that it was not necessary to the decision of the case before the Court, nor was such declared to be the law. The only question decided in that case and held to be the law is the following paragraph:

"It follows that the Michigan corporation which has been consolidated with the complainant, is alone of the consolidated organizations to be considered a company *formed under the laws of Michigan*, and it should have been taxed on the basis on which it was taxed from 1873 to 1878."

Mr. Justice Cooley in his reasoning also uses the following language:

"When, therefore, two corporations created in different States consolidate, *though for most purposes they are not thereafter to be separately regarded*, yet in each State the consolidated company is deemed to stand *in the place of the corporation to which it there succeeded.* * * While in the other State it would stand *in the place* of the other corporation. * * * ."

This language plainly indicates that even in the mind of Judge Cooley, the new entity is a "new corporation," and *succeeded* in each State to the *former corporation* existing in such State.

So we submit that the question decided by the Court was not only not the question as to whether the new entity is *a corporation*, but that the reasoning of Judge Cooley when all read together is entirely consistent with our contention that the respondent is *a corporation.*

For the purposes of this case it is not necessary that such corporation should have been formed exclusively under the general laws of Michigan.

The 1891 act simply provides:

"That One Thousand Mile Tickets shall be kept for sale at the principal ticket offices of all railroad companies in this State, *or carrying on business partly within and partly without the limits of this State, at a price not exceeding Twenty Dollars in the Lower Peninsula and Twenty-five Dollars in the Upper Peninsula.*"

This language would apply to respondent, if it is "a railroad company," carrying on business partly within and partly without the limits of this State, whether organized exclusively under the laws of Michigan, or under the laws of Michigan and the several other States through which it passes.

In this connection we again call the Court's attention to the Wellman case, reported in the 83d Michigan, and to the holding of that Court, that this law, the 1891 act, was intended to apply only to railroad companies *operting* railroads in this State, regardless of the question as to how

such railroads were formed; that it was not intended to apply to old companies out of which consolidated railroad companies were formed, but to the new consolidated company *operating railroads and engaged in the business of carrying passengers.*

It is conceded in the answer of respondent that the respondent now owns and operates the old line of road, "formerly owned by said Michigan Southern Railway Company, and the ticket office mentioned in said petition was and is the ticket office of said respondent upon said road, so, as aforesaid, heretofore owned by the Michigan Southern Railroad Company."

Page 11 of Record.

Respondent further admits:

"Said Michigan Southern Railway Company has had no directors or officers, nor separate stockholders, since the consolidation of the Michigan Southern Railway Company."

See Return, par. 8, p. 17, Record.

These concessions certainly show that the old Michigan Southern Railway Company is not now operating the old road, or any part of it, or anything else.

More than that, it concedes that the old Michigan Southern Railway Company is either extinct, or at least dormant, and has been for many years. For all practical purposes it is not only dead but should be forgotten. The ghost should be bidden to avaunt, and trouble us no more.

We now refer to the cases cited by the learned counsel for respondent in his brief in the Michigan Supreme Court more at length, to point out wherein they are distingnishable from this case.

In Tomlinson *v.* Branch, 82 U. S., and
Central Railroad, etc., *v.* Georgia, 92 U. S.,

cited by counsel. The consolidation in each case was under special act.

And in each case, *one company was merged into the other company.*

In the Tomlinson *v.* Branch case the act provides:

"That whenever the written consent of all the stockholders of the South Carolina Canal & Railroad Company shall have been obtained, *the said South Carolina Canal & Railroad Company shall be merged in the said South Carolina Railroad Company,* and thereupon and thereafter all the

rights, privileges and property belonging to said South Carolina Canal & Railroad Company shall be vested in the said South Carolina Railroad Company * * * *."

A careful examination of this case will show that the Court held, that the South Carolina Railroad Company, into which the other company was merged, remained intact just as before.

Such ruling was simply a statement of the facts, and is good sense.

But the Court also held as to the other company, the one that was swallowed, that its

"Corporate rights and franchise * * which appertain to its existence and functions as a corporation * * became *merged and extinct*."

The case of

Central Railroad Co. *v.* Georgia, 92 U. S., 665.

cited by Mr. Pond, was decided on a similar state of facts.

In this case one railroad was merged into the other.

The Macon & Western Railroad Company was merged "under the *name and charter* of the said The Central Railroad & Banking Company of Georgia."

The act also provided that all outstanding "contracts shall be assumed by, and be binding on the Central Railroad & Banking Company of Georgia, and all benefits and rights under the same shall accrue to and vest in the said last mentioned company."

In the opinion, the Court says:

"Nowhere in the act is there an intimation of any legislative purpose that the Central Railroad Company should cease to exist.

The Macon & Western Railroad was undoubtedly intended to go out of existence; for provision was made for the surrender of all the shares of its capital stock: *and without stockholders it could not exist*."

Following these cases is

Railroad Company *v.* Georgia, 98 U. S., 359.

Here was a plain case of consolidation; no merger one into the other, but both *merged into a new company*, then and there, and *thereby* created and organized *de novo*, out of the old companies.

The Court says:

"It is conceded that under this act a consolidation took

place. It is, therefore, a vital question. What was its effect? Did the consolidated companies become a new corporation, holding its powers and privileges as such under the act of 1863? Or was the consolidation a mere alliance between two pre-existing corporations, in which each preserved its identity and distinctive existence? Or, still further, was it an absorption of one by the other, whereby the former was dissolved, while the latter continued to exist. The answer to these inquiries must be found *in the intention of the Legislature as expressed in the consolidating act.* We think that intention was a creation of a new corporation out of the stockholders of the two previously existing companies. The consolidation provided for was clearly not a merger of one into the other, as was the case of Central Railroad & Banking Company *v.* Georgia, 92 U. S., 665. Nor was it a mere alliance or confederation of the two. If it had been each would have preserved its separate existence, as well as its corporate name. But the act authorized the consolidation of the stocks of the two companies, thus making one capital in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company; *and, if so, how could either have a continued separate being?*"

The Court further says:

"Looking thus at the legislative intent appearing in the consolidation act, we are constrained to the conclusion that a new corporation was created by the consolidation effected thereunder, in the place and in lieu of the two companies previously existing, and that whatever franchises, immunities or privileges it possesses, it holds them *solely by virtue of the grant that act made.*" That generally the effect of consolidation, as distinguished from a union by merger *of one company into another*, is to work a *dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result.*"

The Court again says:

"When, as in this case, the stock of two companies is consolidated, the stockholders become partners, or *quasi* partners, in a new concern. Each set of stockholders is shorn of the power which, as a body, it had before. Its action is controlled by a power outside of itself. To illustrate: The stockholders of the Savanah & Albany Railroad Company could not, after consolidation, have exercised any of the powers or franchises they had prior to their consolidation with the stockholders of the Atlantic & Gulf Railroad Company. They could not have built their road

or controlled its management. They could not, therefore, have performed the duties which by their original charter were imposed upon them. Those duties could only have been performed by another organization, composed partially of themselves and partially of others. Their powers, their franchises, and their privileges were therefore gone, no longer capable of exercise or enjoyment. Gone where? Into the new organization, the consolidated company, *which exists alone by virtue of the legislative grant, and which has all its powers, facilities, and privileges by virtue of the consolidation act.* What then was left of the old companies? Apparently nothing. They must have passed out of existence, and the new company must have succeeded to their rights and duties. *But the new company comes into existence under a fresh grant.* Not only its being, but its powers, its franchises, and immunities, *are grants of the Legislature which gave it its existence.*"

The General Law of 1855, Section 51, provides:

"Upon making the agreement mentioned in the preceeding section, in the manner required therein, and filing a duplicate or counterpart thereof in the office of the Secretary of State, the said two or more corporations mentioned or referred to in the said section, *shall be merged in the new corporation provided for in such agreement*, to be known by the corporate name therein mentioned * * * "

The word "merged" means more than merely "united," "combined," or "joined" together.

Webster defines: "Merged—To be sunken, swallowed up, or lost."

Hence the meaning of the above statute is:

The Michigan corporations entering into such agreement shall be "sunken," swallowed up, or lost, in *the new corporation provided for, etc.*

So we say, that so far as we have been able to examine the several cases cited by counsel, and the several acts authorizing the "*union*" into the new body, the turning point has always been as to whether there was a mere alliance or *joining* of the two or more corporations, or whether the act provided for a *new corporation* and a *merger* of each of the old *into the new.*

The learned counsel, Mr. Pond, p. 44 of his brief in Michigan Supreme Court, says:

"Questions as to the effect of the consolidation of two such corporations have in several instances been before the courts, with the result of decisions which seem to me not quite consistent, but it is unnecessary to attempt to reconcile such cases here."

It seems to us the inconsistancy mentioned by the learned counsel is not as real as he imagines.

We submit that Mr. Justice Strong, who wrote the opinion in the case reported in 92 U. S., *supra*, and also in 98 U. S., *supra*, clearly draws the distinction, and clearly shows that where the statute merely provided for an *alliance*, or *joinder*, or *union*, of two or more bodies, that the old corporations do not necessarily lose their identity, do not necessarily relinquish the old charter. But, that, when the statute provides for a *merger*, that the old company that is *merged*, whether only one, or all of the former companies, loses its existence, and becomes extinct.

The case of Nashua Railroad *v.* Lowell Railroad, 136 U. S., cited by counsel.

In that case there was no merger of either company, neither the statute of Massachusetts, nor that of New Hampshire provided for a merger. The acts of the two States provided only for a *joinder* or *union* of the two old companies.

The Court, in that case, expressly hold, that there is nothing in the law of either State, from which any inference can be drawn, that it was the intention of either Legislature, that the old company should be merged and become extinct.

On the other hand the 1855 statute provides that every Michigan corporation which unites with another corporation, whether within or without this State, "*shall be merged in the new corporation provided for in such agreement.*"

So we insist that it is clear that the old Michigan Company entering into the agreement provided for, became merged, and was "swallowed up or lost" in the new company.

It is also plain that the subsequent conduct of all the parties has been upon that theory.

As was conceded by counsel upon the hearing below.

"Said Michigan Southern Railway has had no separate directors nor officers *nor stockholders* since the consolidation, etc. * * ."

See par. 8 of Return.

And as Mr. Justice Strong well said in Central Railroad *v.* Georgia, 92d U. S., p. 472, *supra:*

"Without stockholders it cannot exist."

It seems to be conceded by the learned counsel, Mr. Pond, that when two domestic corporations, located in the same State, are consolidated into one body, that it is a question of legislative intent, to be drawn exclusively from the terms of the act authorizing the consolidation, as to whether the new body constitutes a *new corporation*, or

whether it is a mere union of former corporations, leaving each of the former corporations as separate and continuing corporations.

Does it not follow that the same rule will apply in case of corporations of different States consolidating?

Is there any reason for a different rule, except that neither State can have any control or power over any of the consolidating companies, except those within its own territorial limits?

If, however, each of the several States pass a law empowering its own domestic corporation to enter into the combination, and the several corporations of the said several States enter into an agreement to form a *new corporation*, under the respective acts of their several respective States, how can any of the parties to the compact thus made, be afterwards heard to say that the new body is not a corporation, or that the old company was not *merged, if the statute of its own State so provides?*

The case of

St. Louis, etc., Ry. *v.* Berry, 113 U. S., 465,

was a consolidation of certain Missouri corporations with certain other Arkansas corporations.

The new body was held to be a *new corporation.*

That the old corporations *became merged and extinct.*

That the special exemptions and immunities belonging to the old companies did not appertain to the new.

Wabash & Pac. Railway Co. *v.* Ham, 114 U. S., 545.

This was a case where certain Ohio, Indiana, and Illinois corporations had been consolidated.

We quote from the opinion:

"Whether the old corporations are dissolved into the new corporation, or are continued in existence under a new name and with new powers, * * * depends upon the terms of the agreement of consolidation, and of the statutes under whose authority that consolidation is effected.

In the present case * * * the consolidation was made under and pursuant to statutes of Ohio, Indiana, and Illinois * * * ."

The effect of the Ohio consolidation act was to *merge the old corporation into the new one*, which took their place, succeeded to their property, and assumed their liabilities. Sheilds *v.* Ohio, 95 U. S., 319; Railway *v.* Georgia, 98 U. S., 359."

The learned counsel for respondent will hardly claim that Mr. Justice Gray, who wrote this opinion, was referring to *two domestic corporations in Ohio.*

We submit there can be no reason why each State authorizing corporations within its own jurisdiction to consolidate with corporations of other States, may not by the terms of the act granting the authority, fix the status, both of the old organization, as well as the new that takes its place, *within the limits of its own territory and jurisdiction.*

See Muller *v.* Dow, 94 U. S., 447.

And when the express terms of the act provide that the consolidated company shall be a *new corporation within such State*, and that the old corporation "*shall be merged in the new corporation provided for in such agreement*," as the 1855 act provides, there can be no doubt that the old company and its old charter become extinct—dissolved—and voluntarily surrendered, and no authority has been cited to the contrary.

The case of

People *v.* N. Y. C., etc., Ry., 129 N. Y., 474,

cited by the learned counsel, Mr. Pond, is not opposed to our contention.

We quote from the opinion:

"The consolidation act of 1869, it is true, assumes, upon the consolidation, not only of domestic corporations, but of corporations of different States, to transfer to and invest in the consolidated company formed under its provisions all the "rights, privileges, exemptions and franchises and property," *of each of the constituent companies.* But the Legislature of this State was impotent alone to accomplish this result. It could not vest the franchises, rights and property of the Pennsylvania, Ohio and Indiana companies in the consolidated company, nor authorize any change or conversion of the stock of the constituent corporations into the stock of the consolidated company, nor confer any exclusive authority for their consolidation. All it had the power to do, and all that the act of 1869, in effect, did do, was to authorize the New York corporation, upon like consent being given by Pennsylvania, Ohio and Indiana, to merge the franchises, property and interests of the several constituents into what would practically be one corporation. When this was sanctioned by the Legislatures of the respective States, and the proper formal proceedings were taken, then, and not till then, could a new body be created.

Whether the result would be a new corporation *de jure*, is a mooted question. (See Muller *v.* Daws, 94 U. S., 444; Shields *v.* Ohio, 95 *id*, 319; St. L., I. M. & S. R. Co. *v.* Berry, 113 *id*, 465; Nashua R. R. *v.* Boston, etc., R. R., 136 *id*, 356.)

But assuming the result to follow, the new corporation would owe its existence not to the State of New York alone, but to the States of New York, Pennsylvania, Ohio and Indiana. It would not be in any strict or even just sense a corporation incorporated under any general or special law of this State * * .

The consolidation act does, indeed, confer new corporate powers upon the New York corporation. Except for that act it could not have entered into the agreement of consolidation. * * * ."

So we say that the Michigan corporation, entering into the consolidated company, was *merged in the new*.

That its successor in Michigan is a *new corporation*.

That such new corporation in Michigan obtained its existence and franchises and rights solely by virtue of the 1855 law, and is subject to all its provisions.

The original charter of the Michigan Southern Railway Company, Section 37, found in Section 548, page 236, Railway Laws of Michigan of 1896, is as follows: "The State reserves the right at any time after thirty years from the passage of this act, by a vote of two-thirds of each branch of the Legislature, to alter, amend or repeal the same; provided the said company shall be compensated by the State for any damages sustained by reason of such alteration, amendment or repeal."

The thirty years had expired before the passage of the act under which these proceedings are instituted. The presumption will be that the act was passed by two-thirds of the members of each branch, that it was passed legally.

It is also true, as we have before shown, that if the company should ask for any damages, the State would pay them, for, it must be presumed, it would pay its honest debts.

It is provided in Section 16 of the Erie & Kalamazoo Railway Company's charter, found in Section 591, page 254, Railway Laws of Michigan of 1896, as follows: "That the said President and Directors * * * shall have power to charge for tolls and transportation such sums as shall be established by the by-laws of the company * * * * ."

It is also provided in Section 11 of the charter of the Michigan Southern Railway, found now in Section 522, page 229, Railway Laws of Michigan of 1896, "That the said company shall have power * * * to charge for tolls and transportation such sums as shall be lawfully

established by the by-laws of said company, not exceeding, etc."

The State also reserved the right to alter, amend, or repeal the charter at any time after thirty years by a vote of two-thirds of each branch of the Legislature.

Section 9, Act 1850, found in Section 568, page 245, Railway Laws of Michigan, 1896.

Now, it is common knowledge, and it is also admitted in these proceedings, because it is stated in the petition and not denied in the answer, that respondent, for many years prior to the filing of relator's petition, had for sale and sold one thousand mile tickets at two cents per mile over the various lines of its railroad. And we submit that it is a fair inference that this rate had been established by the by-laws of the company as the rate for this kind of a ticket.

I also call attention to the decision in the Michigan Supreme Court. Judge Grant and Judge Hooker each filed dissenting opinions, but did not contest the point that the charter of respondent has expired, but rather conceded this.

In addition to the foregoing argument, I also beg leave to present and file the original and also the supplemental brief made and filed by my partner, Judge Richard A. Watts, in the Michigan Supreme Court, in which the points above discussed by me, and the other points in the case, are more ably and fully discussed, and I trust the Court will give the argument of Judge Watts, upon all of the points in the case, due consideration.

Respectfully submitted,

HENRY C. SMITH,

In *pro per.*

No. 227.
App.t to Br. of Smith for D. C.
Filed Mar. 14, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 227.

THE LAKE SHORE AND MICHIGAN R. R. CO.,
PLAINTIFF IN ERROR,

vs.

HENRY C. SMITH.

APPENDIX TO BRIEF OF HENRY C. SMITH.

We print parts of the acts of the legislatures of Indiana and Michigan, in addition to what is printed by Mr. Greene in his brief. Also the articles of consolidation filed with the secretary of state of the State of Michigan. Also the determination of the last board of control of internal improvements of the State of Michigan which fixed the rates of toll for the Southern Michigan road which were in effect January 1, 1846, viz:

An act to incorporate the Indiana Railroad Company, passed by the General Assembly of the State of Ohio March 3, 1851.

SEC. 2. That the capital stock of said company shall consist of five hundred thousand dollars in shares of one hundred dollars each with the privilege of increasing

the same to any amount, not exceeding one million dollars, and shall have power to construct a railroad from the city of Toledo by the most direct and practicable route, to the State line of Indiana and in the county of Williams and at such point as the Buffalo and Mississippi railroad of the State of Indiana may connect therewith, or such other road as may be incorporated by said State to connect with and to form a continuous line from the State line of Illinois, near Chicago to Toledo in this State, and also to construct a railroad from the city of Toledo northward in the direction of Monroe to connect with any railroad running from the direction of Detroit to the city of Toledo.

SEC. 5. That said company shall be, and is hereby, authorized to connect by contract with any other railroad company formed or hereafter formed or incorporated in the States of Indiana or Michigan and consolidate its capital stock and any part thereof with the capital stock of such company or companies in the States of Indiana or Michigan; and to have and use the style and name of any such company or of such other name as they may mutually agree upon, and shall constitute part of such company thus consolidating and in case of such consolidation, to have a uniform width of track with the railroad thus connected with.

An act to authorize railroad companies to consolidate their stock with stock of railroad companies in this or any adjoining State, and to connect their roads with the roads of said companies, and to authorize railroad companies to construct their roads on the routes which they may have heretofore surveyed and located, and to use and occupy the same when completed.

SEC. 1. *Be it enacted by the General Assembly of the State of Indiana,* That any railroad company heretofore organized under the general or special laws of the State, shall have the power to intersect, join and unite their railroad with any other railroad constructed or in process of construction in this State or in any adjoining State at such point on the State line or at any other point as may be mutually agreed upon by said companies. And such railroad companies are authorized to merge and consolidate the stock of the respective companies, making one joint stock company of the two railroads thus connected, upon such terms as may be by them naturally agreed upon, in accordance with the laws of the adjoining State with whose road or roads connections are thus formed: *Provided,* Their charters authorize said railroad to go to the State line, or to such point of intersection. (Approved February 23, 1853.)

We print the remainder of section 5 of "An act to authorize the sale of the Southern railroad, and to incorporate the Michigan Southern railroad," as follows:

"And no railroad or railroads from the eastern or southern boundary of the State shall hereafter be authorized to be built or constructed by or under any law of this State, any portion of which shall approach westwardly of the township of Monroe, in the county of Monroe, within five miles of the line of said railroad, as designated in this act; nor shall any railroad or railroads be so authorized to be built or constructed which shall commence within twenty miles

of the city of Monroe, and extend to Lake Michigan, or the southern boundary line of the State, and the line of which shall, on an average, run within twenty miles of the main line of the said Michigan Southern railroad."

This was repealed by the act of 1883, referred to in Mr. Greene's brief.

We also print section 19 of said original charter, as follows:

"SEC. 19. From the time when the franchises granted by this act shall vest in said Michigan Southern Railroad Company, said company thenceforward and ever afterward, (save on the first day of the week, or in case of accident, which shall prevent,) shall keep open for public use, and in good repair, and with sufficient motive power and cars for the transportation of persons and property, under such by-laws as said company may lawfully make, so much of their railroad in this act mentioned and described as shall extend from the city of Monroe to the village of Hillsdale; and the said railroad between the city of Monroe and Adrian shall at all times be kept in all respects in as good condition and repair as the road between Adrian and Hillsdale; and the motive power and cars of all descriptions shall at all times, on that portion of the road between Monroe and Adrian, be in no respect inferior either in quality or quantity to those on that part of the road west of Adrian; and whenever the said company shall put a T rail or other heavier iron rail than is now laid on said road, or any portion of the line of said road, the said company shall first relay the track between Monroe and Adrian, and place such heavier iron on said track between Monroe and Adrian before such heavier iron shall be placed on the road between Adrian and Hillsdale."

Also section 28, as follows:

"SEC. 28. The said directors, or a majority of them, shall have power to appoint, contract with and determine the compensation of all such officers, engineers, agents and servants whomsoever, as they may deem necessary for the transaction of the business of the company, and remove them at pleasure, and the said directors, or a majority of them, shall have power to determine the manner and evidence of the transfers of the stock in said company, and they shall have power to pass all by-laws which may be necessary for the carrying into execution all the powers vested in the company hereby incorporated: *Provided*, Such by-laws shall not be contrary to the Constitution or laws of the United States, or of this State.

"SEC. 29. The directors shall have full power to conduct the affairs of said company, and to exercise any powers which said company might exercise, except where provision is made by this act for the exercise of such powers by the stockholders at their annual or special meetings, or where the powers of the directors may be restrained by the by-laws of said company (approved May 9, 1846)." March 28, 1850, the original act was amended.

We print section 8 as follows:

"The tariff or rates of toll and passage for the transportation of persons and property on or over that portion of said Southern railroad between the city of Monroe and the village of Adrian, shall never exceed the lowest price at any time charged from the village of Adrian to Toledo, on the railroad between the two last-named places, nor the price at any time to be charged on any railroad leading from any part of the county of Lenawee, directly or indirectly, to any point within the State of Ohio, while or whenever there may be any connection of the Michigan Southern railroad with any other railroad leading into the State of Ohio."

We print section 49 as follows:

"Any railroad company in this State may, by means of subscription to the capital of any other company, or otherwise, aid such company in the construction of its railroad, with the assent of such other company; or any railroad company, in order to facilitate the transaction of business, and prevent the expense to the public of delays, stoppages and unnecessary transhipment of merchandise and passengers, may make any arrangements with other railroad companies within or without this State, for the running of its cars over the road of such other company, or for the working and operating of such other railroads as said companies shall mutually agree upon.

"SEC. 50. Any railroad company in this State, forming a continuous or connected line with any other railroad company, may consolidate with such other company either in or out of this State, into a single corporation.

"SEC. 51. Upon making the agreement mentioned in the preceding section, in the manner required therein, and filing a duplicate or counterpart thereof in the office of the secretary of state, the said two or more corporations mentioned or referred to in the said section, shall be merged in the new corporation provided for in such agreement, to be known by the corporate name therein mentioned, and the details of such agreement, to be known by the corporate name therein mentioned, and the details of such agreement shall be carried into effect as provided therein.

"SEC. 52. Upon the election of the first board of directors of the corporation created by said agreement, all and singular the rights and franchises of each and all of said two or more corporations, parties to such agreement, all and singular their rights and interests in and to every species of property and things in action, shall be deemed to be transferred to and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with all the right of way and all other

rights of property, in the same manner and to the same intent as if the said two or more corporations, parties to such agreement, should have continued to retain the title and transact the business of such corporations.

"SEC. 63. All acts the subjects of which are herein reenacted, or which contravene or are inconsistent with the terms and intention of this act, are hereby repealed."

Articles of Consolidation.

AN AGREEMENT BETWEEN THE MICHIGAN SOUTHERN RAILROAD COMPANY AND THE NORTHERN INDIANA RAILROAD COMPANY, CONSTITUTING THE MICHIGAN SOUTHERN AND NORTHERN INDIANA RAILROAD COMPANY.

Articles of consolidation and agreement, made and entered into the twenty-fifth day of April, one thousand eight hundred and fifty-five, by and between The Michigan Southern Railroad Company, of the first part, and The Northern Indiana Railroad Company, of the second part.

Whereas the said parties of the first part are a railroad company, organized under and by virtue of the laws of the State of Michigan, by a charter and amendments thereto, authorizing the same to construct the railroad and branches in the State of Michigan, in said charter and amendments mentioned:

And whereas the said parties of the second part are another railroad company organized under and by virtue of the laws of the States of Indiana, Ohio and Illinois, authorizing the said parties of the second part to construct railroads, as mentioned in their acts of incorporation:

And whereas the said railroad of the said parties of the first part meets and intersects the railroad of the said parties of the second part, at a point in the boundary line between the States of Michigan and Indiana, and forms therewith a

continuous line of railroads, extending from the city of Chicago to the head of Lake Erie, at Monroe, and also making connection through Ohio, to Toledo, in the State of Ohio:

And whereas the said parties of the first and second parts have intersected, connected, joined and united their railroads by mutûal agreement:

And whereas the charters of the said parties of the first and second parts authorize their said railroads to go to the said State line of the States of Indiana and Michigan, at the said point of intersection:

And whereas the said parties of the first and second parts have mutually agreed to consolidate their respective capitals with each other, and to merge and consolidate the stock of their respective companies, and make one joint stock company of their two railroads, and to consolidate the property and stock of the said parties of the first and second part, and their respective companies upon the terms and conditions hereinafter stated and declared:

And whereas the said parties of the first and second parts are duly authorized by law to consolidate in the manner hereinafter provided:

And whereas the terms of consolidation between the said parties of the first and second parts, hereinafter contained, have been fixed and regulated by the by-laws of the said respective companies, and these present articles are framed and executed in pursuance of such by-laws:

And whereas a majority in interest of the stockholders of each of the said corporations, parties of the first and second parts, at meetings called for that purpose, have passed a vote to consolidate the said two companies:

Now these presents witness, that the said parties of the first and second parts, in consideration of the mutual execution of these presents, do hereby merge and consolidate the stock of their respective companies, and make one joint stock company of their respective railroads, and do hereby

consolidate their respective stock and property, and also their respective companies with each other, and do hereby unite their said two respective corporations, and constitute them into one corporation, to be called "The Michigan Southern and Northern Indiana Railroad Company;" and the said parties of the first and second parts, for the consideration aforesaid, do mutually agree and declare that the name of the said consolidated company, by these presents formed, is and shall be "The Michigan Southern and Northern Indiana Railroad Company," by which name the same shall be a body corporate and politic, and shall have a common seal, and by which name the same shall contract and be contracted with, sue and be sued, implead and be impleaded with, and have all the powers, franchises, immunities, property and privileges now enjoyed by the said parties of the first part, or the said parties of the second part, or which either of the said respective companies of the said first and second parts have or had by virtue of their respective charters before the execution of these presents. And the said parties of the first and second parts, for the consideration aforesaid, do hereby mutually and respectively grant, bargain, sell, release, convey, assign, transfer and set over, unto the said consolidated company, "The Michigan Southern and Northern Indiana Railroad Company," all and singular their several and respective railroads, railroad lands, stations, cars, locomotives, furniture, tools, machinery, fuel, timber, iron, stone and other materials, and all their several and respective bonds, bills, notes, demands, moneys and things in action, and all and singular their several and respective estates, property and effects, real and personal, at law and in equity, wheresoever situated and howsoever held; and all and singular their several and respective franchises, privileges and immunities, and do declare the same henceforth to be the estates, property and effects, fran-

chises, privileges and immunities of the said consolidated company, to all intents and purposes.

And the said parties of the first and second parts, for the consideration aforesaid, do hereby mutually and respectively agree, that all and singular the debts, liabilities and obligations whatsoever of the said parties of the first and second parts severally and respectively, shall be henceforth the proper debts, liabilities and obligations of the said consolidated company, to all intents and purposes.

And the said parties of the first and second parts, for the consideration aforesaid, do mutually agree and declare that the said consolidation shall take effect, and the said consolidated company shall go into operation immediately on the due execution of these present articles, and that the board of directors of the said consolidated company shall carry said consolidation into effect by all necessary acts and things for that purpose.

That the number of directors of the said consolidated company shall be thirteen; that the names of the first directors of said united corporations are John B. Jervis, Edwin C. Litchfield, Charles Butler, John Stryker, Elisha C. Litchfield, Hugh White, John S. Barry, Ezekiel Morrison, John Wilkinson, Thomas Barron, Daniel B. St. John, Hamilton White and Edwin D. Morgan, who shall constitute the board of directors of the said consolidated company, until the first election of directors thereof shall be held. That said board of directors shall meet at Laporte, in the State of Indiana, on the twenty-sixth day of April, one thousand eight hundred and fifty-five, at two o'clock p. m., for organization and the transaction of business; that the first election of directors of said consolidated company shall be held at Adrian, in the State of Michigan, at ten o'clock in the forenoon, on the fourth Wednesday in April, one thousand eight hundred and fifty-five; that the annual election of directors of said consolidated company shall be held on the fourth Wednesday of

April in each year, after the said first election; that the amount of capital of the said consolidated company shall be twelve millions of dollars, and the same shall be divided into one hundred and twenty thousand shares, of one hundred dollars each; that the stockholders of the said companies of the said parties of the first and second parts shall be and continue stockholders of the said consolidated company, in the same respective number of shares, and of the like respective kinds of stock, and upon the like terms and conditions respectively as they now are stockholders in either of the said present companies of the parties of the first and second parts, and that the stockholders of the said present companies of the said parties of the first and second parts shall have power to surrender their shares of stock in either of the present companies of the parties of the first and second parts, to the said consolidated company; and upon every such surrender, stock of the said consolidated company, in equal number and amount of shares and with the like conditions and stipulations, shall be issued to the stockholders respectively making such surrender, and such surrender may be made by returning the certificates of the stock so surrendered to the office of said consolidated company, to be cancelled, and that the stockholders of the said consolidated company shall have all the rights and privileges as stockholders in the said consolidated company which they now have as stockholders in the present company whereof they now are stockholders; and that all the books of account, stock transfer books, notes and obligations for the payment of money, certificates of stock and powers to transfer or to vote upon stock in either of said companies, shall be deemed and taken to be books of account, stock transfer books, notes and obligations, certificates and powers to transfer and vote in said consolidated company, and may be, by said consolidated company, used, issued and reissued, and shall be in all respects recognized

and sanctioned as legal and valid to the same extent and in like manner as they would have been legal and valid in either of said original companies, until otherwise ordered by the board of directors of said consolidated company, and the officers and agents of the company of the parties of the first part shall be the officers and agents of said consolidated company until others are appointed in their places by the board of directors of said consolidated company or by its authority; and that until the board of directors shall make or procure a common seal for the said consolidated company, the present corporate seal of the said parties of the first part shall be the common seal of the said consolidated company; and that the elections of directors of the said consolidated company shall be held under the direction of three stockholders thereof, not being directors at the time, appointed by the board of directors at a meeting previous, or chosen by the stockholders present at the election; that notice of the time and place of the election shall be given by advertisement; that in case an election shall not be held on the day appointed for the same, or shall otherwise fail of being an effectual election, the board of directors may cause such election to be held on another day, by them appointed, and upon like notice; and that all the rights, privileges and immunities, as well of the said parties of the first part as of the said parties of the second part heretofore vested in or exercised by their respective boards of directors or their respective officers, shall be henceforth vested in and exercised by the board of directors or officers of the said consolidated company respectively; for the benefit of the said consolidated company, and that all the deeds, bonds, contracts and other acts and writings of either the said parties of the first part or of the said parties of the second part, shall be and continue the proper deeds, bonds, contracts and other acts and writings respectively of the said consolidated company, without any surrender or change thereof; and that all future subscrip-

tions to the capital stock shall be made, and all issues of new stock upon such subscriptions shall be made as shall be directed by the said board of directors of the said consolidated company.

In witness whereof, the said parties of the first and second parts have caused these presents to be made and executed under their respective common seals, and to be evidenced as well by the signature of the president as by the corporate seal of each of the said companies of the said parties of the first and second parts, the day and year first above written.

JOHN B. JERVIS, *President.* [L. S.]
JOHN B. JERVIS, *President.* [L. S.]

Sealed and delivered in presence of—
ELISHA C. LITCHFIELD,
Secretary pro Tem.

Report of Improvement Board.

* * * * *

The last board, which is known as the sixth board of control of internal improvements, passed a resolution on August 18, 1843, fixing a table of rates as follows:

(Southern railway from Monroe to Hillsdale.)

Monroe to Ida,	9	miles	$0.25
Patersburg,	18	"	.50
Adrian,	35	"	1.00
Clayton,	46	"	1.37
Hudson,	51	"	1.50
Hillsdale,	68	"	2.00

You will see these average a little less than $0.03.

Names of the members of the sixth board as follows: Thomas W. Wells, A. H. Adams, Robert P. Eldridge.

No. 227.
Sup. Brf. of Maynard for D.
Supreme Court U. S.
FILED
MAR 15 1899
JAMES H. McKENNEY,
Clerk

Filed Mar. 15, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 227.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY C. SMITH.

Supplemental Argument of Fred. A. Maynard in Behalf of the Defendant in Error.

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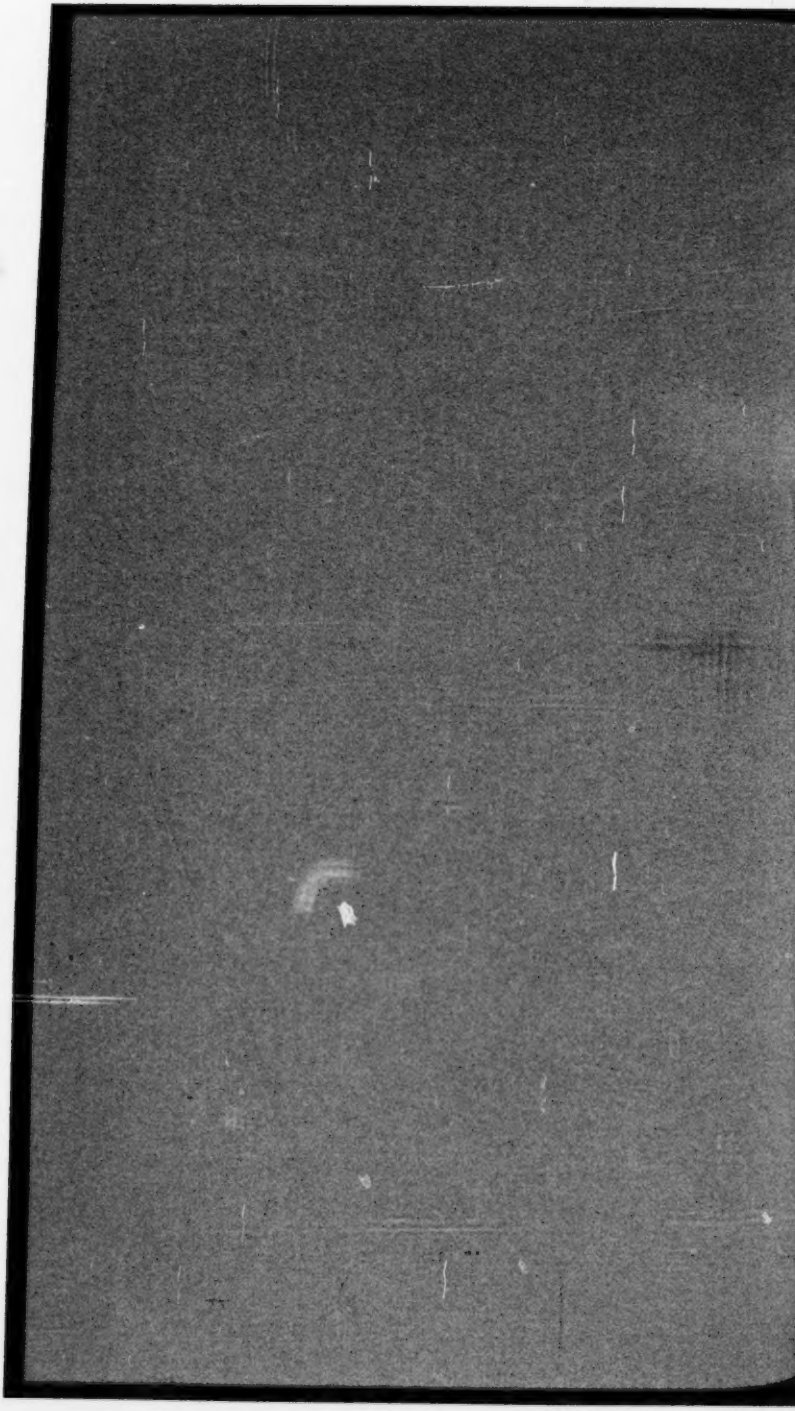

IN THE

Supreme Court of the United States.

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THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY C. SMITH.

Supplemental Argument of Fred. A. Maynard in Behalf of the Defendant in Error.

The single question of law presented in this case is this: The plaintiff in error having *voluntarily* sold mileage tickets good for one thousand miles of travel for one person and for one year, can it be *compelled* by the State of Michigan to issue a precisely similar ticket good upon its lines in said State, not only for the purchaser, but his wife, and for *two* years instead of *one?*

This the plaintiff in error is required to do by a law of the State of Michigan. The plaintiff in error claims that this law is unconstitutional. The law is presumed to be constitutional. Therefore the burden rests upon the plaintiff in error, to show wherein it is unconstitutional, as courts will never declare a statute void unless its invalidity, in their judgment, is placed beyond a reasonable doubt. A reasonable doubt must be solved in favor of the legislative action and the act sustained.

Mr. Greene says in his brief that the act of 1891 in question is in violation of article 1, section 10, of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts; that the State entered into a contract in 1846 with the Michigan Southern Railroad Company, and that the plaintiff in error is the successor of that company, and has acquired and is possessed of all the rights, powers, and privileges to which that company was entitled under such charter and contract, among which was and is the right to charge and receive three cents per mile for transportation of a passenger over said road.

Assuming that the State of Michigan in 1846, through its legislature, had attempted to make such a contract, the first great question of law is this: *Did the legislature of 1846 have the power to contract with the Michigan Southern Railroad Company that it should have the right to fix its own rates or charges for the transportation of passengers, and thereby place it beyond the power of subsequent legislatures to change such rates?*

This is the exact question raised by Chief Justice Waite in *Ruggles vs. Illinois, 108 U. S., 528.* His words are:

> "The only question that need be considered is whether the charter of the Central Military Tract Railroad Company, one of the Illinois corporations, which, through agreements of consolidation, are now represented by the Chicago, Burlington & Quincy Railroad Company, purports on its face to grant to the company the right to fix the rate of fare and freight to be charged for the conveyance of persons and property on its railroad free of all control by the State. If on examination we find that no such grant was intended, it will be unnecessary to decide *whether one legislature has the power to bind succeeding legislatures by a contract to that effect.*"

The question was not decided because the court found that no such grant was intended, and it has never been decided.

My first claim, then, is this: *That the legislature of 1846 did not possess the power to enter into this contract even if the intention to make a contract fixing rates was unmistakable.* In support of this proposition I have many points to urge.

In the first place, this whole question hinges upon this point: Is the fixing of rates and tolls, a *governmental* question, which therefore is not the subject of contract, or is it the subject of contract? If rates and tolls belong to the first class each legislature can deal with the question. If, however, they are the subject of contract, the rate fixed in the charter cannot be disturbed. My position is that the legislature of the State always has the power to fix the rates of

tolls upon the lines of road within its jurisdiction, subject only to the one limitation, that the rate so fixed must be reasonable.

That the State cannot by contract divest itself of this power of controlling and regulating rates; that there is now and always has been a limitation upon legislative power to make such a contract; that the regulation of railroad charges is a part of the police power of the State, and that this power, essential to the safety and the protection of the people of the State, cannot be contracted away; "that in all cases arising under this power there can be no contract, no irrepealable law, because it is a governmental subject involving public interests, and legislative acts concerning them are necessarily *public laws*."

Newton *vs.* Commissioners, 100 U. S., p. 559.

If this proposition is correct, then the whole claims of the respondent relative to its vested rights which it secured under the old charter of 1846 falls to the ground. It is conceded that these limitations upon legislative power exist. These are the words of Chief Justice Fuller in delivering the opinion of the court in New York and New England Railroad Company *vs.* Bristol, 151 U. S., p. 567:

> "It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligations of contracts, or the deprivations of property without due process, or the equal protection of the laws by the

States, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. *The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury.*" (Citing the familiar cases of Beer Co. *vs.* Massachusetts, 97 U. S., 25; The Fertilizing Co. *vs.* Hyde Park, 97 U. S., 659.)

In other words, that wherever the preservation of the public safety, the public health, the public morals, and the public welfare is concerned an act of one legislature granting in the most positive terms franchises, rights, and privileges may be repealed by a subsequent legislature, and this, notwithstanding the State, through its legislature, may have entered into a most solemn contract, and on the strength of which private parties may have in good faith invested millions of dollars. The great principle is "*Salus populi—suprema lex.*"

This rule of law is settled. Does it apply to rates and tolls? Can the legislature enter into a contract on this subject which will bind subsequent legislatures? We say not. Because it is essential to the public safety that this power of control should be retained by the people; because it is a part of the Police power of the State which cannot be contracted away. It is not the subject of contract. Naming a rate is simply a license given by the State to the company to charge a certain rate until such a time as a subsequent legislature

may determine to change the rates, and it can be changed at any time whenever the public welfare and safety demands it, and lowered from time to time so long as the rate is not unreasonably low; and a railroad company can never complain until it is able to show that the law prevents it receiving a reasonable return upon its investment.

The learned counsel for the plaintiff in error have been unable to find a single case decided by this court, or by any court of last resort in this country, to sustain their position, that the fixing of rates and tolls is a subject of contract, except one case in Mississippi, to which I shall hereafter refer. It is true that there are a number of decisions of this court in which the justice writing the opinion inserts a clause which intimates that such might be the case, but there has been no decision of this court to that effect.

On the contrary, the reasons given in many decisions of this court, in my opinion, sustain my position, that the fixing of rates and tolls is purely a *governmental* question, which is not the subject of absolute contract.

Munn *vs.* Illinois, 94 U. S., 113.

Chicago, Burlington and Quincy Railroad Co. *vs.* Iowa, 94 U. S., 155.

Peik *vs.* Chicago and Northwestern Railway Co., 94 U. S., 164.

Winona and St. Peter Railroad Company *vs.* Blake, 94 U. S., 180.

Ruggles *vs.* Illinois, 108 U. S., 526.

Stone *et al. vs.* Farmers' Loan and Trust Co., 116 U. S., 307.

Wabash, etc., R'y Co. *vs.* Illinois, 118 U. S., 586.

Dow *vs.* Beidelman, 125 U. S., 680.

Georgia Railroad and Banking Company *vs.* Smith, 128 U. S., 174.

Chicago, Milwaukee, etc., R. R. Co. *vs.* Minn., 134 U. S., 418.

Chicago, etc., Railroad Co. *vs.* Wellman, 143 U. S., 339.

Budd *vs.* New York, 143 U. S., 517.

Covington and Cincinnati Bridge Co. *vs.* Kentucky, 154 U. S., 204; see opinion, same case, Kentucky court of appeals, 54 A. and E. Railroad Cases, 466.

Reagan *vs.* Farmers' Loan and Trust Co., 154 U. S., 362.

St. Louis and San Francisco Railway Co. *vs.* Gill, 156 U. S., 549.

Smyth *vs.* Ames, 169 U. S., 466.

"The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public; they are invested with the right of eminent domain only to be exercised for public purposes; therefore, they are subject to legislative control in all respects necessary to protect the public against danger, injustice and oppression."

Ch. J. Fuller in Bristol case, *supra*, 571.

Under this statement of law, it clearly follows that the power of control over rates must remain with the people, or else the crime of extortion can be practiced by a railroad company under a claim of a vested right so to do, and no power remains in the State to prevent it.

If, in 1846, the rate had been fixed at 10 cents a mile, and the railroad company could now carry the passenger at a profit of 2 cents a mile, it clearly follows that the company would obtain from each passenger the extortionate charge of 8 cents for each mile of travel. What stronger example could be used to show that this legislative control must remain?

> Mr. Justice Harlan in Smyth *vs.* Ames, 169 U. S., 544, Brief, pp. 6 and 7; Mr. Justice Bradley in Wabash, &c., R. R. Co. *vs.* Illinois, 118 U. S., 586, Brief, p. 7; Mr. Justice Brewer in Budd *vs.* New York, 143, p. 517, Brief, pp. 22 and 23.

Notwithstanding these decisions, it is seriously urged that the police power of the State has no application to the case at bar, for the reason that the contract with a railroad company relative to the rates and the tolls to be exacted from passengers has nothing whatever to do with life, public health, public morals, and public safety. Therefore, when such a contract, no matter how unfavorable it may be to the State, is once made, the obligation of said contract is forever protected from legislative impairment by the Constitution of the United

States. My answer to this proposition is found in the words of this court, over and over again repeated, that a railroad is a public highway, created for public purposes, and performs the function of the State; and that when capitalists put their money into the construction of a railroad they know that they are doing *pro tanto* the work of the Government, and they voluntarily submit to the control of the Government, relying upon the good sense of the legislative department, and knowing that they can appeal to the courts when an act has been passed which deprives them of the use of their property. In other words, when they can show that the law deprives them of a reasonable return on their investments. To exact from a passenger more than a reasonable rate is extortion. It is the clear duty of the State to save its citizens from this extortion.

The subject of rates and tolls, being absolutely essential to the welfare of all the people, must always be within and governed by the police power of the State. It is not the subject of contract to the extent that it cannot at any time be changed or modified by a subsequent legislature when it shall appear that the welfare of the people depends upon such a change being made. The rule for which I contend is a recognition of the great principle that this power of legislation is a power of government, continuing in its nature, and therefore the State always within its own jurisdiction, has the power to limit the amount of charges to be exacted by railroad companies. By the police power the State has

the power to regulate the conduct of its citizens one towards another and the manner in which each shall use his own property when such regulation becomes necessary for the public good.

Though the judges of this court may have differed in opinion as to what forms of property are affected by this rule, there is no disagreement, nor never has been, as to the application of it to railroad companies.

Railroad companies are carriers for hire. They are incorporated as such and given extraordinary powers in order that they may the better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interests and subject to legislative control as to their rates of fare and freight. It is settled by the decisions of this court that the legislature, in the exercise of its police power, has the right to fix rates, tolls, and charges for railroad corporations. The police power being absolutely inviolable, it follows that the right and power of the legislature to fix and regulate those rates, tolls, and charges cannot be contracted away.

The same limitations surround and the same necessities demand the application of this portion of the police power as demand the application of any other portion of it, and there is no reason why the fixing of rates, tolls, and charges should constitute an exception to the principle that the police power of the State cannot be bargained away. The rule is that the legislature cannot by any contract divest itself of legislating

at any time upon any subject in which the lives, health, and welfare of the citizens is concerned. That right can no more be bargained away than the power itself. Is there any question that the right and authority to regulate common carriers and the charges to be made and the tolls taken by them has always been exercised by the several States to prevent excessive and exorbitant charges and unjust discriminations? These are matters in which the public is largely and vitally interested. The railroad is a quasi-public corporation, and its charter is granted not merely for the purpose of placing the corporation in the position where it can make money, but the main design is for the public good, and to promote the general welfare of the community, and all its rights of eminent domain, all its franchises as a corporation, are delegated and conferred upon it by the legislature as a trustee for that great purpose. Therefore the power of the legislature to regulate the tolls of a railroad is but a part of the police power of the legislative department of the State government, and the test of that power is whatever is necessary to preserve and protect the rights of one citizen without invading the rights of another. Such power being vested in the legislature, and absolutely necessary for the protection of the people, it cannot be parted with, and on no subject is it more imperatively necessary that the power should be retained in the fixing of rates and tolls.

I claim that the words of Mr. Chief Justice Waite in Stone *vs.* Mississippi, 101 U. S., 817, are applicable to this case:

"ALL AGREE THAT THE LEGISLATURE CANNOT BARGAIN AWAY THE POLICE POWER OF THE STATE.

"Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police. * * *

"No legislature can bargain away the public health, or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental control is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. * * *

"The power of governing is a trust committed by the people to the government, no part of which can be granted away.

"The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights.

"These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must vary with varying circumstances. They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are sub-

ject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality. The contracts which the Constitution protects are those that relate to property rights, not governmental."

Mr. Justice Swain says, in Newton *vs.* Commissioners, *supra*:

"In all governmental subjects there can be no contract—no irrepealable law.

"They involve *public interests*, and legislative acts concerning them are necessarily *public laws*.

"Every succeeding legislature possesses the same jurisdiction and power with respect to them as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less. All occupy, in this respect, a footing of perfect equality. This must necessarily be so in the nature of things. It is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies touching the subject involved may require. A different result would be fraught with evil."

It follows that the clause relative to rates and tolls in a railroad charter is not in any sense a contract within the meaning of the Constitution of the United States. It is simply a license, which the State, under its police power and for the protection of the public, may at any time change and reduce the rates, so long as it does not undertake to place them below the standard of reasonableness. The distinction

must be recognized between the *contractual* and *governmental* power of the State.

To wit, that the provisions of the Federal Constitution in reference to contracts only prohibits the States from passing laws impairing the obligation of such contracts *as relate to property rights*, but not to subjects that are purely governmental.

It is by the exercise of this power that this court has determined that the arbitrary power does not exist in the board of directors of a railroad company to fix any rates and tolls that they see fit when the power is given to them in words like these:

> "The directors are hereby authorized to fix such rates as they may deem to be reasonable."

You have set aside these words by writing into the charter the great common-law principle that the rates fixed shall be reasonable. No matter what the words used, they are subject to the law. This law prohibits the legislature from making any contract on the subject which a subsequent legislature cannot change.

SECOND PROPOSITION.

If I have not demonstrated that this power of fixing rates can never be contracted away, I certainly have demonstrated that when it is claimed to have been parted with it must be established by the clearest possible language, and if there is any doubt whatever in regard to the matter the doubt must

be resolved in favor of the State and against the corporation. As Chief Justice Waite said in Ruggles *vs.* Illinois:

> "Grants of immunity from legitimate government control are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established the legislature is free to act on all subjects within its general jurisdiction as the public interests may seem to require."

And in Stone *vs.* Yazoo and Miss. R. R. Co., 62 *Miss.*, 607, the only case in the United States which holds that rates and tolls are the subject of contract, these words are found:

> "It can only be where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of toll that the power of the legislature afterwards to interfere can be denied. It is not to be presumed that the right of legislative control was intended to be renounced. Every presumption is against that. If the grant can be interpreted without ascribing to the legislature an intent to part with any power, it will be done. Only what is plainly parted with is gone."

Such being the rule, we need only to apply this rule to the charter upon which the plaintiff in error relies to say that there is not one single word in the charter which justifies the claim that there has been an abandonment of this governmental power. As in the case of Georgia Banking Company *vs.* Smith, 128 U. S., 180, the charter in this case was framed upon the theory that a railroad was subject, like an ordinary wagon road, to the use of all persons who were able to place

the necessary conveyance upon it, and it was then, in 1846, generally supposed that, while the company constructing the road was the owner of the road-bed, any one could run cars upon it upon payment of the established tolls and following the regulations prescribed for the management of trains. This idea runs through this entire charter. It is an old, antiquated instrument, and upon reading it, it is clearly seen that it applies to conditions which have long since passed away.

It is contended by counsel for the plaintiff in error that the power is given the company absolutely and unqualifiedly to fix rates not exceeding the maximum named. The fact is that no such power was given.

In section 15 these words are found: "Provided said company shall charge no greater sum than was charged or authorized by the State January 1, 1846."

But how much was charged by the State does not appear in this record.

The charter under consideration grew out of a sale of the railroad therein named, built by the State of Michigan. This work was but a part of a scheme for internal improvement which originated in the early history of the State. See act 57, p. 152, and act 97, p. 193, Public Acts of 1837, and act 104, p. 190, Public Acts of 1839, which repeals act 97, which is entitled "An act for the regulation of internal improvements and for the appointment of a board of commissioners." Section 13 of said act reads as follows:

"The Commissioners of internal improvement are hereby authorized and required to establish the rate of tolls, subject, however, to the direction of the legisture, to be paid on all the articles conveyed on any of the canals or railroads now owned or hereafter to be constructed by the State, and to erect all such toll-houses, weighing scales, offices and other edifices, and also to purchase such grounds for the convenience thereof, as they may think necessary for the convenience and profitable use of their canals and railroads; and they are hereby authorized from time to time to make all such rules and regulations, in respect to the collection of tolls and the payment thereof, as they may deem expedient."

In 1840 the legislature of Michigan passed act number 63, p. 91, Public Acts of 1840, entitled "An act for the regulation of internal improvement," which repeals act 104 so far as the same contravenes the provisions of the act. By section 18 of this last act it is made the duty of the collectors on any canal, railroad, or other public work to collect the tolls prescribed by the board from all persons who may travel on the same; and by section 19 said board is authorized and required to establish the rates of tolls to be paid by passengers and on all articles of freight conveyed on or over any canal, railroad, or other public work now or hereafter constructed by the State, *subject, however, to the revision and decision of the legislature.*

See also Sec 20. P. 213 = R.S. of Mich. 1846

Under these laws the State constructed two short lines of road, namely, the Central railroad and the Southern railroad. The State was not successful in running them, and

the legislature of 1846 passed an act, number 42, which authorized the sale of the Central Railroad Company and to incorporate the Michigan Central.

And act number 113, authorizing the sale to the Southern railroad and to incorporate the Michigan Southern Railroad Company. These two acts are in many respects identical; but it will be found that section 15 of the Central charter and section 15 of the Southern charter are entirely different. In section 15 of the Southern charter is found these words:

> "It shall and may be lawful for the said company from time to time to fix, regulate and receive the tolls and charges taken for the transportation of property and persons on said railroad. * * * *Provided*, said company shall charge no greater sum or tolls for the transportation of persons or property than were charged or authorized by the State of Michigan to be taken on the Southern railroad on the first day of January last"—that is, January 1, 1846.

It is simply an assumption that the rate was three cents a mile on the first of January. After a careful examination I have been unable to find any record of the board of internal improvements. In section 5, act number 63, Public Acts of 1840, it is made the duty of the board to keep a complete record of all their proceedings, but this record seems to have been lost; but from section 19 of the said act it appears that the rates of toll fixed by said board were subject to the revision and decision of the legislature.

It follows that there is not a single word in any act of the

legislature of Michigan, or in the charter itself, which justifies the claim which has been persistently made from the beginning, that the State had by contract agreed to permit the railroad company, incorporated in the act of sale, to charge during the life of said charter a fixed rate. On the contrary, by the law which was in existence at the time the incorporators made their investment, they knew that the whole power of regulation rested in the legislature. And yet Mr. Greene, on pages 41, 42, and 43 of his brief, seeks to distinguish this case from Ruggles *vs.* Illinois, 108 U. S., 526. He says on page 42: "There is a material difference between the charter provisions in that case and in the case at bar."

In that case no maximum rate was fixed as in the case at bar. Consequently, it may well be held that the matter was left subject to legislative control, while in this case a maximum is fixed, and therefore power is given the company absolutely and unqualifiedly to fix rates not exceeding said maximum. An examination of the statutes which I have made shows there is no foundation in law for this claim. The proviso in section 15 of the charter of the Southern Company is a limitation upon the power granted in the clause preceding—"to say because a limit is designated it creates a contract is not sanctioned by reason or authority"—54 A. and E. Railroad cases, 469.

The sole object of the insertion of the maximum rate in railroad charters is always to limit the power of the board of directors in fixing rates and tolls and to protect the State and the people of the State from extortion.

A simple permission to railroad companies to charge an amount which the legislature may fix upon as a reasonable amount for the time being. But counsel have sought to use these words as an affirmative grant of power to themselves. *Read from page 31 in my brief.*

> "Only where there is an unmistakable manifestation of a purpose to place the unrestricted right in the corporation to determine rates of compensation, is it possible to deny to a subsequent legislature the right to change those rates?"
>
> "The rule of construction, in this class of cases, is that it shall be most strongly against the corporation. Nothing is to be taken as conceded but what is given in unmistakable terms—or by an implication equally clear. The affirmation must be shown. Silence is negative, and doubt is fatal to the claim."

Where, I ask, is there a single word in this charter which expresses any such intent?

I think that I have demonstrated by a simple reference to the decisions of this court and the reasons therein contained that the fixing of rates and tolls is a governmental question; that it is not the subject of contract, but it is a part of the police power of the State, and that each legislature in turn can take up the question of rates and tolls and examine them with reference to the facts and circumstances then existing, and change them from time to time, as the circumstances may require, subject only to the limitation that they must not fix the rate so low as to prevent the

stockholders from receiving a reasonable return on their investment.

Second. That if this power of control can be contracted away at all it is only where it appears from the charter that the intent so to do is established beyond any reasonable doubt.

Third. That there is nothing whatever in this charter which shows any purpose or intent whatever to give the absolute power of control to the board of directors.

Section 37 of the public charter refers simply to the rights, privileges, and immunities secured to the railroad company in the charter by contract, among them being the right to exist as a corporation, to the exclusive use of its road-bed, the right to issue bonds, the right to acquire property by eminent domain, etc. As was said by Mr. Chief Justice Waite in Stone *vs.* Mississippi—

> "It is not the charter which is protected, but only the contract the charter may contain. If there is no contract, there is nothing in the grant on which the constitution can act."

It follows, then, as a matter of course, if the power to contract with reference to rates and tolls did not exist or was not exercised, section 37 has no reference to them. In the act provision had been made for the State to buy back the road, and this clause was simply inserted in case of any change, modification, or repeal of the charter that the purchasers should be reimbursed for any damages that they can

show they had sustained on those matters which were the *subject of contract and formed a part of the consideration of the sale.* If there be a doubt as to what was the subject of contract it must be resolved in favor of and not against the State. Pages 7 to 21 of Mr. Greene's brief are devoted to his point—that the legislature of Michigan had no constitutional power to require his road to sell a mileage book good for two years, for the reason that the State was thereby depriving the company of the right to manage its own property. Answering this point, Mr. Justice Montgomery, in announcing the opinion of the supreme court of Michigan, says:

> "It may be said that every attempt to fix rates of toll, or rates for the carriage of passengers, to some extent involves an interference with the management and control of the property of a railroad company. It cannot be successfully contended that it would not be competent for the legislature to provide that a ticket furnished to a passenger should be good for a definite reasonable time, and when such legislature is adopted it of necessity deprives the company of the power to make rules inconsistent therewith.
>
> Quoting from Elliott on Railroads:
>
> > 'In some of the States it is provided by statute that tickets shall be good for a certain number of years, notwithstanding any limitation thereon.'
>
> "If such enactment be within the power of the legislature, where is the line to be drawn short of that fixed by the Federal Supreme Court, which is that legislation of this character must not be so unreasonable as to deprive the company of the use of its property."

Attorney General *vs.* Old Colony Railroad Company, 160 Mass., p. 62, also meets this objection. The point was raised by the counsel for the railroad company, but is not regarded as important enough to be seriously considered. The court divided, the majority holding that the legislation was unconstitutional simply because it required one company to do business upon the credit of another. But it is assumed by all the judges that the act requiring the issue of mileage books was reasonable, and that the legislature of a State has the constitutional right to make any reasonable regulation for the benefit of the public in regard to the transaction of any or all of the railroad business in the State which does not conflict with any expressed or clearly implied provisions of the constitution of the State or of the United States.

I have argued in my principal brief that by consolidation with several other companies the old Michigan Southern Railroad Company voluntarily surrendered its charter of 1846, and my associate, Mr. Smith, will discuss the question at length. I respectfully submit that the judgment of the supreme court of Michigan should be affirmed.

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